

D1V5dav1 conference  
1 UNITED STATES DISTRICT COURT  
1 SOUTHERN DISTRICT OF NEW YORK  
2 -----x  
2

3 KELTON DAVIS, et al.,  
3  
4 Plaintiffs,  
4

5 v.  
5

10 Civ. 699 (SAS)

6 THE CITY OF NEW YORK, et al.,  
6  
7 Defendants.  
7

8 -----x  
8  
9 DAVID FLOYD, et al.,  
9  
10 Plaintiffs,  
10

11 v.  
11

08 Civ. 1034 (SAS)

12 THE CITY OF NEW YORK, et al.,  
12  
13 Defendants.  
13

14 -----x  
14  
15 JAENEAN LIGON, et al.,  
15  
16 Plaintiffs,  
16

17 v.  
17

12 Civ. 2274 (SAS)

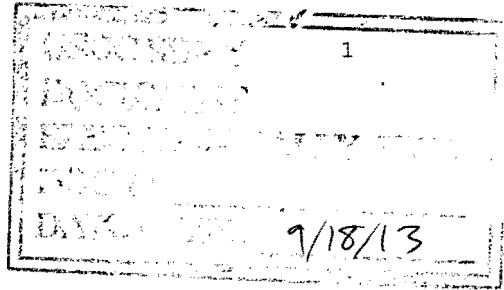
18 THE CITY OF NEW YORK, et al.,  
18  
19 Defendants.  
19

20 -----x  
20  
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21  
22 Before:  
22  
23

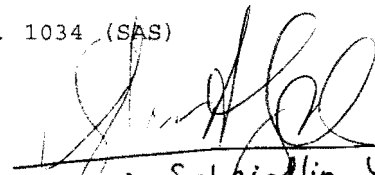
23 HON. SHIRA A. SCHEINDLIN,  
24

24 District Judge  
25

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The Clerk of the Court is directed to  
docket this transcript of the  
January 31, 2013 conference in  
Floyd v. City of New York, 08 Civ. 1034.

  
Shira A. Scheindlin, USDT  
9/18/13

January 31, 2013  
4:32 p.m.

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1 (Case called)

2 THE COURT: All I can say is that they were on notice  
3 of the conference. If they choose to absent themselves then I  
4 guess they waived any comments on some of the issues that might  
5 affect them. There is only one issue that might affect them  
6 and they're not here. They certainly had fair notice of the  
7 conference. Mr. Rappaport is not here and there was somebody  
8 who was going to cover.

9 MS. COOKE: Donna Murphy.

10 THE COURT: So, as far as I'm concerned, they've kind  
11 of waived their right to be heard on issues we discuss today.

12 This may be the hardest part of the conference. We  
13 have Mr. Moore.

14 MR. MOORE: Good afternoon, your Honor.

15 THE COURT: In the Floyd case and we have Mr. Charney  
16 in the Floyd case.

17 MR. CHARNEY: Good afternoon.

18 THE COURT: We have Ms. Karteron in the Ligon case and  
19 Mr. Dunn in the Ligon case.

20 MR. DUNN: Yes.

21 THE COURT: We have Ms. Rosenbloom in the Davis case  
22 and Ms. Steinberg in the Davis case.

23 I also recognize Mr. Maer. Which one are you?

24 MR. MAER: Ligon.

25 THE COURT: Mr. Maer.

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1 And you are?

2 MR. HELLERMAN: Eric Hellerman for Floyd.

3 THE COURT: Mr. Hellerman.

4 And you are Jennifer Borchetta? Ms. Borchetta, you

5 are with which case?

6 MS. BORCHETTA: Floyd, your Honor.

7 THE COURT: And?

8 MR. WEINGARTEN: Richard Weingarten for defendants,

9 your Honor.

10 THE COURT: For defendants.

11 MR. WEINGARTEN: Correct.

12 THE COURT: Your last name is what?

13 MR. WEINGARTEN: Weingarten.

14 Let me start with the defense lawyers I do know.

15 Ms. Grossman, Ms. Cooke; good afternoon.

16 MS. GROSSMAN: Good afternoon.

17 MS. COOKE: Good afternoon.

18 THE COURT: There you are, Mr. Zuckerman. Good

19 afternoon.

20 MR. DUNN: Good afternoon, your Honor.

21 THE COURT: Ms. Donnahue, good afternoon.

22 MS. DONAHUE: Good afternoon.

23 THE COURT: Ms. Publicker?

24 MS. PUBLICKER: Yes, good afternoon.

25 THE COURT: Mr?

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1 MR. KUNZ: Mitch Kunz, your Honor.

2 THE COURT: Mr. Kunz, good afternoon.

3 And Mr. Vickers and Ms. Richardson --

4 MS. RICHSON: Ms. Richardson, your Honor.

5 THE COURT: Thank you.

6 There are other lawyers here. I'm sorry I didn't say

7 hello directly but hello. Wait, there is a Ms. Kovel?

8 MS. KOVEL: The rest of us are in the back.

9 THE COURT: You are for the plaintiffs?

10 MS. KOVEL: In Ligon.

11 THE COURT: Yes, I see more of you now. I see

12 Mr. Mullkoff and others. All right.

13 The reason we're having a conference of all three  
14 cases at once is because the Court has been concerned for some  
15 time about the overlapping issues raised in the three cases. I  
16 raised this in an off the record chambers conference at the end  
17 of one of the matters briefly and then obviously it arose after  
18 the preliminary injunction decision in the Ligon matter. And I  
19 decided that the best way to discuss the problem with the  
20 overlapping case was to have a joint conference.

21 The issue that overlaps is not liability but remedies.  
22 I realize that none of the cases have been tried, so to speak.  
23 One case has had a preliminary injunction hearing and the  
24 decision on the preliminary injunction. Even in that decision  
25 issued on January 8th I reserved the vast bulk of potential

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1 remedies for what I called a remedies hearing which would be  
2 held after submissions -- written submissions on the remedies  
3 issue for both sides. I put in that opinion some supposed  
4 remedies, asked for submissions, written submissions from both  
5 sides and said there would be a remedies hearing. I also said  
6 that I might as well combine that with the remedies phase of  
7 the Floyd trial which was coming up very soon in March. The  
8 plaintiffs in Floyd, I think, have previously requested  
9 bifurcation of liability remedies. I have denied that request  
10 to bifurcate and said, no, I might as well just try the case  
11 cover to cover and then decide it cover to cover. Obviously,  
12 with no liability, there would never be any remedies, but I  
13 didn't want to bifurcate. Davis wasn't even a part of this  
14 discussion. But, when I realized I was going to combine the  
15 Ligon remedies hearing and Floyd remedies proof, I invited the  
16 Davis plaintiffs to join too so we could discuss remedies at  
17 once.

18 The problem was highlighted in the City's request for  
19 a stay of even the very limited relief that I imposed in the  
20 preliminary injunction decision -- very, very limited relief.  
21 I said most of it is being put off but the one I would grant  
22 now is please comply with the Constitution of the United  
23 States -- at least as I interpret it -- and the City said,  
24 well, it is not that simple to comply with your view of it all  
25 and would require retraining and training materials and all the

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1 rest of it.

2 And I thought the City had a point. It is not so  
3 simple to say just comply, it requires a lot of work. So, I  
4 did in fact grant the stay even with that very limited remedy  
5 pending addressing all relief in one big package because we  
6 can't do this kind of thing piecemeal, it is difficult.

7 So, here we are. Now, after I said all of this,  
8 recently I received a January 28 letter from the Floyd  
9 plaintiffs proposing an alternative to the idea of a  
10 consolidated remedies hearing. Of course that, in effect,  
11 renews their request to bifurcate the liability phase and the  
12 remedies phase in the Floyd trial, something I'm still not  
13 happy about.

14 But, putting that aside for the moment, they proposed  
15 a process which they describe as a collaborative remedial  
16 process, and they candidly say that their proposal is modeled  
17 after a similar process that was ordered in a Southern District  
18 of Ohio case titled: In Re: Cincinnati Policing. Apparently  
19 in that case there was a procedure where the major stakeholders  
20 in the issues such as community organizations, police officers,  
21 experts, all sat down together over a period of time with a  
22 Court-appointed facilitator, discussed together what could be  
23 done, tried to reach consensus in a 90-day hearing. If  
24 consensus couldn't be reached I gather it simply comes back to  
25 the Court for the proposed remedies hearing.

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1 So, in effect, it does renew that request for  
2 bifurcation. This letter came in only Monday. I have not yet  
3 had a written response from the City. I know they have an  
4 awful lot to do defending these three cases even though their  
5 team is large and I have no idea if they're prepared to give me  
6 some oral input at least today as to their view, at least the  
7 general outline of the idea proposed by the plaintiffs' lawyers  
8 in Floyd.

9 I should add I think that I also received a January  
10 28th letter from the Ligon plaintiffs' lawyers saying that I  
11 think that they agree with a Floyd proposal. Is that right?

12 MS. KARTERON: Yes, your Honor.

13 THE COURT: So, two of the three cases weighed in.  
14 Have the Davis plaintiffs put anything in writing.

15 MS. STEINBERG: We have not put anything in writing  
16 but the letter reflected that we agree as well.

17 THE COURT: So, the three different plaintiffs groups  
18 are on board with this process, but obviously I haven't heard  
19 anything yet from the City.

20 Who might be willing to address that? Ms. Grossman?

21 MS. GROSSMAN: Yes, your Honor. The City is opposing  
22 engaging in this collaborative process.

23 As we highlighted in our stay application, we contend  
24 that the Court has taken a very broad view in its  
25 interpretation and application of what constitutes a Terry

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1 stop, and given that the Court's view is in conflict with the  
2 City's interpretation of the Fourth Amendment, we believe this  
3 is an impediment to having engaging in this process. And, in  
4 addition, I understand that this was a voluntary process in the  
5 Cincinnati case so we don't think it is appropriate to be  
6 ordered to engage in that process.

7 We are ready to proceed and we oppose bifurcation.

8 THE COURT: That is a very short but decisive answer.

9 I think the City is saying if they don't want to do  
10 this they shouldn't be ordered to do this. It may be  
11 disappointing that they want to do it, peculiarly disappointing  
12 to me because it might be so-called overbroad interpretation of  
13 the Fourth Amendment which I think did nothing but quote from  
14 Second Circuit and Supreme Court cases back to back to back  
15 quotation to quotation to quotation, but maybe you don't like  
16 the quotations from the Supreme Court and the Second Circuit.  
17 Be that as it may, if you don't wish to engage in it I won't  
18 compel you. Sad though it may be. It may be a missed  
19 opportunity but I'm not going to compel you. If that's your  
20 view that's your view.

21 So, I'm not going to bifurcate. I already said that  
22 we are going to go right from the liability proof into the  
23 remedies hearing. However, I am combining it with the other  
24 two cases. All three cases will do the remedies portion of  
25 this trial together. I can't tell you the day that that

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1 portion will be reached, but it seems to me it can't be until  
2 April. It is going to be a couple weeks anyway for the  
3 liability proof, wouldn't you agree?

4 MR. MOORE: Yes.

5 THE COURT: It is going to be two weeks at least.

6 MR. MOORE: I would say maybe three or four weeks.

7 THE COURT: Certainly. So, when we get to that point  
8 you need to confer with each other collectively, figure out  
9 witnesses or experts, collectively cross-examine -- that is  
10 once, but it can be any of the lawyers, collectively make the  
11 proposal what remedies you seek, collectively respond to  
12 briefs. I mean, I just want to do the remedies portion once.  
13 I understand, as I said, that nothing is going to happen unless  
14 there is a liability finding but it may as well complete the  
15 fact record, the evidentiary record all at once. I do not wish  
16 to bifurcate.

17 Yes, Ms. Grossman?

18 MS. GROSSMAN: Yes. I guess with the Davis plaintiffs  
19 and the Davis case being added I don't -- I mean, if the trial  
20 is not about the Davis issues how is it that we are going to be  
21 consolidating Davis remedies when -- isn't this the cart before  
22 the horse?

23 THE COURT: Because this is the remedies proof  
24 portion. It is as if I was trying the remedies portion before  
25 the liability portion. It is done all the time in simple

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1 little injury cases, they say let's try damages before  
2 liability. It might lead to a settlement.

3 The Court has the power to try any portion of the case  
4 before any other portion, so Davis will join in on the remedies  
5 phase before there is any trial on liability so that that part  
6 of the evidentiary record is done once. There is no point in  
7 trying it three times.

8 MS. GROSSMAN: Well, we reserve the right to call  
9 appropriate witnesses to address the Davis issues.

10 THE COURT: What does that mean?

11 MS. GROSSMAN: I don't know what it means until I know  
12 what the Davis proof is.

13 THE COURT: Ms. Grossman, you made the point in your  
14 stay application that you can't give a remedy that applies only  
15 to police officers who are outside TAP buildings in the Bronx.  
16 There is one police force in this City; a big, large police  
17 force. You can't train some officers under one standard and  
18 another bunch of officers under a different standard. They are  
19 one City and one police force; one set of training material,  
20 one set of supervision, one set of monitoring. If there is  
21 going to be relief it has to be common. You can't separate it  
22 out.

23 The Housing Authority no longer has the Housing  
24 Authority Police. The Transit Police, Housing Police and the  
25 regular NYPD were all merged years ago. We can only do this

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1 once. To the extent that they may never prevail on liability  
2 then certain parts of the remedy may never take effect, but the  
3 general training materials that might explain to the police  
4 department the standards for Terry stop, how to conduct a Terry  
5 stop, how to conduct an investigatory stop, etc., etc., that's  
6 common. And if there is a remedy and after it's imposed and  
7 there is an appeal, you will get the final ruling someday on  
8 all of those standards but it is only one standard for all  
9 police officers and that's the basis for combining the three.

10 MS. GROSSMAN: But the issues that will be combined  
11 are those that only overlapped with Floyd and Ligon.

12 THE COURT: Oh yes. I think that's right.

13 MS. GROSSMAN: Not anything that is unique to Davis.

14 THE COURT: I think that's right. We are not going to  
15 get into what goes on in the lobby or the stairwells and all  
16 that. That's not the point. That's not the point. I think it  
17 is these big generic issues that you pointed out, investigative  
18 stops, Terry stops, training on those issues, etc. We are not  
19 going to talk about stairwells and hallways because that  
20 wouldn't be a common issue.

21 MS. GROSSMAN: Or house rules or vertical patrols?

22 THE COURT: Did I not say vertical patrol? It was  
23 clear. You have to listen to each word. I said vertical  
24 patrol. I used that. I said stairwells, lobbies. I said  
25 vertical patrol, said all of that, so, of course not. We are

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1 not going to try the unique issues, we are trying the common  
2 issues of remedy that apply to the New York City Police  
3 Department which is one united department and can only have one  
4 standard and that was the basis for your stay application.

5 MS. GROSSMAN: Well, I just wanted to register our  
6 objection to the Davis plaintiffs being part of that,  
7 especially before liability is determined.

8 THE COURT: It is reverse bifurcation. It is done all  
9 the time.

10 MS. GROSSMAN: I understand that.

11 THE COURT: And it is being done here.

12 MS. GROSSMAN: I wanted to make sure the record is  
13 preserved.

14 THE COURT: The record is carefully preserved.

15 MS. GROSSMAN: Yes.

16 THE COURT: Now, there is some briefing due on this  
17 issue in Ligon, right?

18 MS. KARTERON: That's right, your Honor. You asked us  
19 to make a submission in February, I believe on the 22nd.

20 THE COURT: And a response date was also set, is that  
21 right?

22 MR. DUNN: Your Honor, they were simultaneous briefs.

23 THE COURT: Is that right? Is that what I said?

24 MR. DUNN: I believe.

25 MS. KARTERON: Yes, your Honor.

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1 THE COURT: How does that affect the Floyd and Davis  
2 plaintiffs who weren't being asked to make a separate  
3 submissions at this time on remedies? Do you want me to  
4 postpone that date somewhat so that you can collaborate and  
5 make one submission on behalf of all three cases? So that it  
6 might be that the Ligon plaintiffs write the first draft but  
7 the other lawyers want to look at it, comment, revise so that  
8 it is one submission on remedies?

9 MR. MOORE: I think that would make sense, Judge.

10 THE COURT: You think that makes sense. So, I'm  
11 willing to do it that date. There is really no rush in the end  
12 because I don't think we'll get to remedies proof until  
13 sometime in April.

14 MS. GROSSMAN: Your Honor, what does it mean for the  
15 City?

16 THE COURT: Oh, I'm moving both. The date moves for  
17 both sides.

18 MS. GROSSMAN: Okay.

19 THE COURT: Oh sure.

20 What would you propose, Ms. Karteron, instead of  
21 February 22nd, so you have time to confer with all of these  
22 lawyers? A lot of lawyers.

23 MS. KARTERON: Before that I would be concerned about  
24 25 pages being shared among the three cases.

25 THE COURT: I understand. Why don't you confer and

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1 tell me a proposal on both date and length.

2 (Counsel conferring)

3 MS. GROSSMAN: Your Honor, one question?

4 THE COURT: Yes, ma'am.

5 MS. GROSSMAN: I think it was contemplated in our  
6 February submission in Ligon was to respond to the Court's  
7 proposed relief.

8 THE COURT: That's true.

9 MS. GROSSMAN: So that is still what we're talking  
10 about here, correct?

11 THE COURT: Maybe, but let's give everybody a moment  
12 to confer. I want to hear plaintiff's view first.

13 MS. GROSSMAN: Okay.

14 THE COURT: I don't know that the proposed relief  
15 would be all that different. It was pretty generic but we will  
16 see.

17 (Counsel conferring)

18 MS. GROSSMAN: Your Honor, another question. Are you  
19 contemplating that we submit a response to the proposed relief  
20 before the trial starts? Okay, I just wanted to make sure I  
21 understood.

22 MS. KARTERON: I think I might have missed that  
23 exchange.

24 THE COURT: She said do I want these proposals before  
25 the start of the Floyd trial.

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1 MS. GROSSMAN: Correct.

2 THE COURT: And the answer is going to be yes, so it  
3 will be some date that you are going to propose before the  
4 start of the Floyd trial.

5 MS. KARTERON: We need one more second.

6 THE COURT: Which is still somewhere between March 11  
7 and March 18th, something I expected to discuss today.

8 MR. MOORE: Judge, just for clarification, obviously  
9 because Floyd is sort of the global case.

10 THE COURT: It is.

11 MR. MOORE: And reaches the entire practice within the  
12 NYPD.

13 THE COURT: It does.

14 MR. MOORE: Obviously the remedies that we might be  
15 discussing would be somewhat unique to that situation.

16 THE COURT: It might be different than those I put in  
17 that opinion. That was a question that Ms. Grossman raised  
18 just a moment ago, were these submissions limited to what I put  
19 in the January 8th opinion. I said, well, I think so, but I  
20 want to hear from plaintiff's first.

21 MR. MOORE: I would think it would have to be broader  
22 than that.

23 THE COURT: Yes. I'm hearing that.

24 MR. CHARNEY: We would strongly ask that we --

25 THE COURT: I'm hearing that.

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1 I thought of another problem that I want to talk about  
2 with both Ligon and Davis, come to think about it.

3 Floyd, as you know, is a non-jury trial. Have you  
4 given thought to whether Ligon or Davis are jury or non-jury  
5 trials?

6 MS. KARTERON: We have not yet made, given it any  
7 serious thought, your Honor. As you know, we are still fairly  
8 early in our case having not conducted discovery on the other  
9 matters.

10 THE COURT: You are. I am just concerned that if it  
11 is a jury trial you would be deprived of your right to a jury  
12 on the remedies proof if it's done collectively and then I say  
13 you obviously can't do it all over again. The whole point was  
14 efficiency of doing it once unless you were to either waive the  
15 jury on the remedies portion and ask for a jury only on  
16 liability. I think you can do that.

17 MS. KARTERON: Well, your Honor, given that, as again,  
18 we have been in the game significantly less time than the other  
19 cases here and have only conducted limited discovery at this  
20 point --

21 THE COURT: I know of that. I thought of that issue  
22 right now as I was sitting here: Have the Davis plaintiffs  
23 thought about the jury versus non-jury issue.

24 MS. ROSENBLOOM: Your Honor, we have thought about it  
25 but would like to have a little more discussion. Could we let

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1 you know in the next weeks?

2 THE COURT: You can, but it affects in some ways the  
3 entire plan because what I'm saying is if you have a right --  
4 if you have a right to a jury I can't deprive you of your right  
5 to a jury trial by preventing you from going to the jury.  
6 However, I'm not entirely sure that you can't consent to the  
7 remedies portion of the case being non-jury -- blah, blah --  
8 while a liability verdict is taken which you have to reserve  
9 on. I'm not sure either, but I think you would have to look  
10 into that.

11 MS. ROSENBLUM: Your Honor, because of the shortage  
12 of seating, if the Davis plaintiffs could have 30 seconds to  
13 confer with the gallery? We will get right back to you.

14 MS. GROSSMAN: Your Honor, just for the City's  
15 perspective, the defendants have a right to a jury trial; we  
16 have demanded one as well.

17 THE COURT: But you lost it in Floyd when they waived  
18 damages claims, right?

19 MS. GROSSMAN: Correct in Floyd, but not on Davis and  
20 Ligon.

21 THE COURT: Yes and no. If there are no damages  
22 claims you would be in the same position as Floyd. Maybe yes,  
23 maybe no. I don't know the answer. If they were to waive  
24 damages claims would you not be in the same position?

25 MS. GROSSMAN: Possibly.

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1 THE COURT: I don't know any of those answers either.  
2 You are entitled to one, obviously --

3 MS. GROSSMAN: Yes.

4 THE COURT: -- if there are damages claims. I  
5 understand that.

6 MS. GROSSMAN: But I'm just saying that I wouldn't  
7 favor a waiver for remedy but then we have a jury trial on  
8 liability. I think that we would argue that we are entitled to  
9 a jury trial on all if you're going -- it is not enough -- if  
10 the whole thing is waived a jury trial is waived for all  
11 claims.

12 THE COURT: On damages.

13 MS. GROSSMAN: If damages claims are waived for  
14 liability and remedy then I think we're in the same place as  
15 Floyd.

16 THE COURT: Well, I don't know about that.

17 If the damages claims are waived but the plaintiffs  
18 still request a jury which they could I think, I mean, in fact  
19 I urge the Floyd plaintiffs to do that so even if they waive  
20 the damages claims they could still prefer a jury trial. I  
21 don't know that that gives you a right any longer to a jury  
22 trial on the issue of remedies because there would be a damages  
23 claim and then we may be able to bifurcate liability and  
24 remedies. But, we're all talking without any research.

25 MS. GROSSMAN: Correct.

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1 THE COURT: Certainly I am. I haven't looked into the  
2 issue.

3 MR. DUNN: Also, Judge, the submission that you would  
4 get because it would be far reaching prospectively because it  
5 involves the Floyd case, whatever Ligon and Davis would submit  
6 along with Floyd counsel on the remedy issue would certainly  
7 aid the Court and aid the parties in trying to figure out the  
8 remedies. Assuming there is a liability finding in Floyd you  
9 are going to have to deal with remedies and you would have the  
10 benefit of that thinking from all the three cases.

11 THE COURT: Oh, I understand.

12 MR. MOORE: I mean, you wouldn't necessarily limit  
13 their right one way or the other, it seems to me. I mean --

14 THE COURT: We are exploring all of that.

15 MR. DUNN: Your Honor, on the jury issue, if I might,  
16 and on the waiver which seems an important concern, one thing I  
17 would like to be clear about. In terms of Ligon, you entered a  
18 PI --

19 THE COURT: Yes. I know you are entitled to remedy on  
20 the PI. I understand that.

21 MR. DUNN: We want to make sure whether you anticipate  
22 us also making a remedy presentation on the balance of our case  
23 outside of the stops at issue in the PI which we thought no.

24 THE COURT: Oh, I thought yes because I don't think  
25 remedies are particularized to eight stops.

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1 MR. DUNN: Well, but as you pointed out, remember the  
2 balance of our case is inside the buildings.

3 THE COURT: Yes, I do understand.

4 MR. DUNN: Those are the vertical patrol type things.

5 THE COURT: On that, on the inside situation I agree  
6 with what Ms. Grossman raised in the Davis case. I'm not  
7 interested in visiting the technical issues with vertical  
8 patrol and inside patrol.

9 MR. DUNN: That's a big part of our case.

10 THE COURT: That will have to wait.

11 MR. DUNN: I understand.

12 THE COURT: I want to deal with parts that you have  
13 proof which overlap best with the Floyd case. We are going to  
14 leave all of this inside stuff which has its own peculiar  
15 issues in both Davis and Ligon.

16 MR. DUNN: Very well.

17 THE COURT: Did you say you were going to get back to  
18 me, Ms. Rosenbloom?

19 MS. ROSENBLOOM: Your Honor, the problem for us is we  
20 would like to consult with our clients.

21 THE COURT: Sure.

22 MS. ROSENBLOOM: We do have individual clients with  
23 individual damages claims so we don't feel we can waive the  
24 right to the jury at this moment.

25 THE COURT: No.

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1 MS. ROSENBLUM: We understand that your Honor is  
2 speaking about the Monell portions of the remedy being heard  
3 together. Of course we have no objection to combining those  
4 presentations, but we do need to have some consultation with  
5 our clients.

6 THE COURT: Right. I understand. We are just  
7 exploring it for the first time here in terms of all three  
8 cases trying to work together on the issues. It is not easy.  
9 But you all sort of created this problem with these three  
10 separate cases that raise common issues. It has not been easy  
11 for the defense or the Court.

12 So, now we have to talk about what are the submissions  
13 that are being called for. I agree with what Mr. Worth said,  
14 the proposed relief will probably be broader than that which  
15 was proposed in the Ligon PI context and, not only broader, but  
16 in some ways different because you have certain other issues  
17 such as race claims.

18 MR. CHARNEY: Right.

19 THE COURT: And -- whatever, you have some different  
20 issues.

21 MR. MOORE: Yes.

22 THE COURT: So, I do think the broadest possible  
23 submission on remedies is the best submission and that may in  
24 fact have us fall back on at least two separate submissions  
25 because the Ligon submission was really directed at the January

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1 8th opinion proposals and you want your relief, it is timely,  
2 you got a PI, you're entitled to that relief and when that  
3 relief is given, liability relief, it sounds like it is an  
4 appealable order. So the sooner we get to it, the better.

5 So I think in the end this should be two submissions.  
6 Where that leaves Davis I can't tell you, but I do think now  
7 that we probably should separate the Floyd and the Ligon  
8 submissions on remedies -- I mean, I think you should read each  
9 others for sure, you don't want to be in conflict. I do want  
10 you to make sure to work together to some extent but I do think  
11 there is a reason for separate submissions. Where this leaves  
12 Davis I don't know.

13 MS. STEINBERG: We would ask just to do a separate  
14 submission. We have overlap with both of cases.

15 THE COURT: Right.

16 MS. STEINBERG: So it is hard to figure out how we  
17 would have race claims and significant overlap with Ligon so I  
18 think it would be simpler to do a separate submission.

19 THE COURT: But clearly shorter. Yours, at this point  
20 falls third, but just because of where these two are up to in  
21 the process of trials and briefing so there needs to be  
22 exchange of briefs, there needs to be not repetition.

23 MS. STEINBERG: Certainly.

24 THE COURT: Your brief may be at the end of the day  
25 after reading the other two we don't have anything to add and

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1 we join in both briefs; or we have very little to add, here is  
2 our 10 pages.

3 MS. STEINBERG: Certainly.

4 THE COURT: So let's now talk about dates and page  
5 limits.

6 Did you confer a little bit on dates? When do you  
7 think this submission can be made? Because I think it would be  
8 very good to have it pretrial.

9 MS. KARTERON: Your Honor, if you would like it before  
10 the trial --

11 THE COURT: Yes.

12 MS. KARTERON: -- we propose March 8th. We need some  
13 more time with it.

14 THE COURT: I think March 4th is the latest we can go.  
15 I can't read it over the weekend, neither can anybody. So,  
16 March 4th makes some sense. In terms of page limits, it is a  
17 very important issue, I would think. Here is -- I'm just  
18 throwing this out: 35 for Floyd, 25 for Ligon 10 for Davis  
19 with, please, every effort to review one another's briefs and  
20 not repeat everything. You may not need all of those pages  
21 when you see the first one.

22 MS. GROSSMAN: Can you repeat that? I didn't hear.

23 THE COURT: The suggestion is, frankly: 35 Floyd, 25  
24 for Ligon, 10 for Davis all due on March 4th.

25 MR. CHARNEY: Your Honor, while we are on this issue,  
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1 this is a Floyd specific issue but I think it applies here but  
2 i wanted to get it out of the way which I was going to ask you  
3 later.

4 We also have a lot of pretrial submissions due in the  
5 month of February and one of the ones we were going to ask for  
6 a brief extension on was our proposed findings of fact and  
7 conclusions of law and we were actually going to ask for March  
8 5th, so could we have until March 4th on that stuff? Because  
9 it was originally due in February.

10 THE COURT: I don't see a problem. That is not  
11 something that I usually need before trial anyway.

12 MR. CHARNEY: Could we have longer now that we have  
13 this submission?

14 THE COURT: I don't find it a particularly useful  
15 document in advance of the non-jury trial. It doesn't do much  
16 for me. Everybody asks to annotate it after the trial for the  
17 record anyway and I always say yes to that, it is helpful. So,  
18 frankly, why don't you meet and confer with the defendants and  
19 pick a joint date.

20 MR. CHARNEY: Thank you. That's great, your Honor.

21 THE COURT: It is not a terribly important document to  
22 me pretrial but it may be important to each other in which case  
23 you should confer with each other.

24 MR. CHARNEY: Thank you, your Honor.

25 MR. MOORE: It is possible we can do it after the

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1 trial.

2 THE COURT: Why don't you confer with each other  
3 because it may be more important to the adversary than it is to  
4 me pretrial. Frankly, as I said, I don't usually turn to those  
5 until post-trial when they're annotated to the record. That's  
6 been my experience in non-jury trials. I don't study the  
7 proposed findings of fact in advance but the adversary may want  
8 them. You may want theirs. You may not. Why don't you please  
9 talk to each other on that. It may be that you jointly decide  
10 it is one less thing to do and you want to put it off.

11 MS. GROSSMAN: So, you're open to that.

12 THE COURT: I am hopeful that after you confer with  
13 each other. But it may be that you want to see each others'  
14 for tactical reasons. You have to talk to each other on that  
15 point.

16 Now, assuming that -- You want to confer?

17 MS. GROSSMAN: No. I want to make sure this doesn't  
18 adjust the pretrial order date.

19 THE COURT: No, it shouldn't do that. You need to get  
20 that in. I want to see witnesses and exhibits and continuing  
21 ideas of length.

22 Now, assuming I stick with this idea of 35, 25 and 10  
23 it is still all about, I assume, about things such as training  
24 and supervision and guidelines and all the rest of it. It does  
25 seem to me -- tell me if I'm wrong -- that the City should be

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1 able to make one submission in response. It may be longer than  
2 usual but I don't see why it can't be consolidated.

3 MS. GROSSMAN: Your Honor, if we can consolidate it  
4 that would be our preference.

5 THE COURT: Of course.

6 MS. GROSSMAN: But can we wait until we see the  
7 submissions?

8 THE COURT: You don't need to wait. I have to give  
9 you some notion of the length now. The date is the -- oh,  
10 these weren't responsive, these were simultaneous, right?

11 MR. MOORE: Right.

12 MS. GROSSMAN: I don't know if it makes sense, I --

13 THE COURT: You know, I'm not sure that can work  
14 anymore because the City has seen the Ligon proposal made by  
15 the plaintiffs' lawyers before the trial -- before the PI  
16 hearing, then they saw my January 8th opinion so they're  
17 reacting to something. This way they don't know what Floyd is  
18 going to write in the March 4th submission. It is kind of hard  
19 for them to respond after all they're not proposing relief,  
20 they're responding to --

21 MR. MOORE: Their relief would be dismiss the case.

22 THE COURT: Quite seriously that is more than exactly  
23 right.

24 So, they're not making a proposal brief, they're  
25 responding to a proposal. They could do that in Ligon but they

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1 have no way to do it in Floyd when they haven't seen your 35  
2 pages.

3 So, since they do know exactly what is on the table in  
4 Ligon now they can certainly start drafting but another week  
5 wouldn't hurt, so March 11th for the joint submission? But I  
6 surely wouldn't wait until March 4 to start writing. You know  
7 what they're going to say in Ligon, it is in my January 8 order  
8 and in their briefs before trial. They made their remedies  
9 proposal in their brief.

10 MS. GROSSMAN: Your Honor, I have no problem with the  
11 March 11 but we do have a trial that is supposed to be starting  
12 March 11.

13 THE COURT: I know, but we have been floating between  
14 the 11th and 18th.

15 MS. GROSSMAN: Okay. If you can tell me that you are  
16 even open to the 18th maybe?

17 THE COURT: I have always been open. Doubtful, but  
18 open all along.

19 MS. GROSSMAN: I'm still advocating for the 18th.

20 THE COURT: I know, but we need to talk about length.  
21 There are still many issues we will get to by the end of the  
22 day. Anyway, I see you need the week delay because you have to  
23 see what Floyd writes but, please, don't leave the drafting  
24 until then because you do know I said allot about the Ligon.

25 MR. CHARNEY: We will be talking a lot, the three

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1 cases.

2 THE COURT: I know, but from the defense perspective  
3 they have seen the January 8th opinion and they've seen the  
4 Ligon plaintiffs submissions before the hearing.

5 MS. GROSSMAN: May I have a moment to confer?

6 THE COURT: Sure.

7 (Counsel conferring)

8 MS. GROSSMAN: Your Honor, I understand that on Ligon  
9 since we have some proposed findings, proposed relief --

10 THE COURT: Correct.

11 MS. GROSSMAN: That is we can start addressing that.

12 THE COURT: Yes.

13 MS. GROSSMAN: But the problem I have is I think if  
14 you're suggesting March 4th, that all parties for the  
15 plaintiffs, Davis, Ligon and Floyd --

16 THE COURT: Yes.

17 MS. GROSSMAN: -- and then we have to respond by March  
18 11, I understand that we can do that for Ligon.

19 THE COURT: Well, you could do that on March 4. These  
20 were supposed to be simultaneous but since they're  
21 consolidated --

22 MS. GROSSMAN: I understand. My chief concern is that  
23 to give us a week to respond Floyd and Davis is, given the  
24 broad -- I have no idea of what --

25 THE COURT: I agree. I agree that you didn't have an  
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1 idea. After you see it you may come to court and explain that  
2 it is vastly different than what Ligon said and much, much more  
3 than you expected and quite different, but it may be that it's  
4 quite similar and there is really no problem. You won't know  
5 until you see it. So, if need be, you will come rushing to  
6 court I'm sure.

7 (Continued on next page)  
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1 MS. GROSSMAN: Okay, as long as we understand that if  
2 it's not similar that --  
3 THE COURT: That's right.  
4 MS. GROSSMAN: We need the time.  
5 THE COURT: I suspect it should be similar.  
6 Identical, I doubt, but similar.  
7 Now, we did talk about page limits.  
8 MS. GROSSMAN: Well, It's --  
9 THE COURT: I know, it's 70 pages from them, but that  
10 doesn't mean you need 70 pages.  
11 MS. GROSSMAN: I don't want to write 70 pages.  
12 THE COURT: Right, I agree.  
13 MS. GROSSMAN: I mean --  
14 THE COURT: Guess what, I don't want to read them  
15 either.  
16 MS. GROSSMAN: I know, but I really do think we should  
17 at least have a chance to look at what --  
18 THE COURT: I have to set a number today, total of 50  
19 pages, 50 pages. Maximum. Nobody has to use the pages  
20 allocated. Please remember that in all the three cases. If  
21 you don't need 35 and 25, please don't use them. There is no  
22 need to over write.  
23 are you folks conferring?  
24 MR. CHARNEY: Sorry.  
25 THE COURT: That's okay. I just, the City seems to  
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1 learned so well to say could we have a moment, it helps if you  
2 want.

3 MR. CHARNEY: No, we're okay.

4 THE COURT: No. Okay. Look, the reason to do this in  
5 part is to call witnesses once, to make an evidentiary record  
6 once. That's what I'm trying to achieve. It's not only for me  
7 to have briefing once. But it's just wrong to put people  
8 through the same exercise three times. Well --

9 MR. MOORE: I'm just concerned, Judge, and I've  
10 expressed this before with respect to the remedial phase,  
11 that --

12 THE COURT: Yes.

13 MR. MOORE: -- given how the case has progressed with,  
14 you know, coming down to a bench trial and --

15 THE COURT: Your choice.

16 MR. MOORE: No, I understand. But --

17 THE COURT: Yes, I know.

18 MR. MOORE: -- and that there may be a necessity to  
19 provide input from people that we have not as, of this date,  
20 identified as our expert witnesses on remedies or experts on --

21 THE COURT: I don't know why. I denied your request  
22 to bifurcate more than a month ago. Denied. Surely you heard  
23 the words.

24 MR. MOORE: No, I understand that.

25 THE COURT: All right. Well, then that's your

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1 problem.

2 MR. MOORE: And, well, it's not just our problem.

3 It's really -- it should be everybody's concern.

4 THE COURT: Well --

5 MR. MOORE: And that's why we put some effort into  
6 this. When you said consult, we put some effort into trying to  
7 come up with what we thought was a fairly innovative and we  
8 thought productive approach to try and resolve an issue that's  
9 important to everybody in the --

10 THE COURT: I may have thought so too, but the City  
11 opposes it. I'm not their lawyer. I'm a neutral Judge. If  
12 they oppose it, they oppose it.

13 MR. MOORE: I understand. I think that, as I said,  
14 and I'm just repeating myself, this is an important case, it  
15 raises important issues.

16 THE COURT: I'm sure you're aware I know it's an  
17 important case.

18 What is the new point you're making, Mr. Moore? I'm  
19 aware it's important.

20 MR. MOORE: The Court should have the benefit of much  
21 input on the remedial stuff as they can.

22 THE COURT: Okay.

23 MR. MOORE: And if that means there is a witness who  
24 has not yet been identified that we think should be identified  
25 for you that we would talk about in our brief and then perhaps

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1 put on at the end of the trial, I think the Court should be  
2 open to allowing us to do that.

3 THE COURT: It may be the case. I don't know yet who  
4 you have in mind, and why they aren't identified before. I  
5 don't know -- maybe there's no such person, maybe there is. I  
6 can't deal with maybes. When you have a problem, tell me about  
7 it.

8 MR. MOORE: Right. All right, Judge.

9 THE COURT: All right.

10 MS. GROSSMAN: I would absolutely object at this  
11 point. I've objected to these late productions and late  
12 identifications of other witnesses, and this would be highly  
13 inappropriate and prejudicial to us.

14 THE COURT: Well, I do have two other cases that are  
15 being asked to partake in the remedies phase and they were not  
16 a part --

17 MR. MOORE: Right.

18 THE COURT: -- of the date cutoffs that were set  
19 earlier, so let's see if there is an issue. I don't know what  
20 potential witnesses he's talking about. I don't know potential  
21 experts he's talking about. I will cross bridges when they  
22 come. When they look it over, there may be nobody else. We  
23 don't know.

24 MS. GROSSMAN: But, your Honor, I mean this has been  
25 raised more than once and you've shut him down more than once,

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1 and now he's raising it again.

2 THE COURT: I have enough problems here, I don't shoot  
3 anybody, but go ahead. Yes, I'm just saying I don't like the  
4 words.

5 MR. MOORE: I'm ducking, Judge.

6 THE COURT: Yes.

7 MS. GROSSMAN: Right. Well, the bottom line is that  
8 the plaintiffs are clearly interested in adding to their  
9 witness list, and that's obvious, and for us to not have notice  
10 of that is not right and --

11 THE COURT: Who said you don't have notice? Today is  
12 January 31st. We're going to reach remedies in April. I don't  
13 know that you have don't have notice. Let's see if and when  
14 you get notice of a witness in any one of these three cases on  
15 the remedies phase. It's two full months off.

16 MR. MOORE: Right.

17 THE COURT: Full.

18 MS. GROSSMAN: But we're supposed to know the case  
19 before so that we can mount a defense and --

20 THE COURT: I understand.

21 MS. GROSSMAN: And to do this last minute, this is not  
22 right.

23 THE COURT: Well, all right, Ms. Grossman, I've got  
24 your view on the record.

25 MS. GROSSMAN: Okay.

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1 THE COURT: Okay.

2 MS. COOKE: Could we have one second?

3 THE COURT: Sure.

4 MS. GROSSMAN: So, your Honor, if the plaintiffs are  
5 expected to identify new witnesses --

6 THE COURT: I didn't say they're expected.

7 MS. GROSSMAN: I'm sorry, and dates in Ligon, if  
8 they're going to be identifying witnesses -- we have a joint  
9 pretrial order due very shortly.

10 THE COURT: What's the date?

11 MS. GROSSMAN: What's the date that they're going  
12 to --

13 THE COURT: What is the date of the joint pretrial?

14 MS. GROSSMAN: February 19th.

15 THE COURT: Is that right?

16 MS. GROSSMAN: And we need to discuss, the plaintiffs  
17 have to give us their joint pretrial order probably next  
18 Thursday in order for us to be able to respond and produce one  
19 the following week. So we need to know, you know, who the  
20 witnesses are so that --

21 THE COURT: Right. Look, to make things very very  
22 clear, if there's going to be an expert that you haven't  
23 already identified with respect to this remedial phase -- and  
24 you did know your request to bifurcate was denied a month ago,  
25 you must come up with this name immediately so they can respond

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1 to it.

2 MR. MOORE: We will, Judge.

3 THE COURT: Okay.

4 MS. GROSSMAN: When? I mean, we're supposed to start  
5 in five weeks and the joint pretrial order -- we were supposed  
6 to get notice of any additional witness by December 30. It is  
7 so late that we shouldn't have to deal with this. But I want  
8 to know what I'm dealing with, so I can register my objections  
9 and oppose, and I think we should know it sooner rather than  
10 later. If they know who they have in mind right now, they  
11 should give it to us tomorrow.

12 THE COURT: Mr. Moore, by when can you do this?

13 MR. MOORE: Can I consult, Judge?

14 THE COURT: Sure.

15 (Conferring)

16 MR. CHARNEY: Sorry about that, your Honor.

17 The reason we wanted to confer with the other  
18 plaintiffs is because we want to make it clear that the date  
19 we're talking about here applies only to the Floyd case,  
20 because these folks --

21 THE COURT: I understand. They were only recently  
22 added into the notion of this particular particularly Davis,  
23 but well Ligon has known since the opinion came out, but okay.

24 MR. CHARNEY: So I guess just on the Floyd issue, we  
25 would ask that we have I guess, what did we say, two weeks?

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1 THE COURT: No, that's impossible. It's impossibly  
2 late now. I would think maximum would be a week from today.

3 MR. CHARNEY: Okay.

4 THE COURT: And that's the 7th of February, that's the  
5 maximum. And when I see that or when the City sees it, there  
6 may be much to talk about. I don't know what you're going to  
7 say. I'll see it when I see it, but no later than the 7th.

8 MR. CHARNEY: Got it.

9 THE COURT: All right, so --

10 MS. GROSSMAN: So I'm still unclear, your Honor --

11 THE COURT: Yes.

12 MS. GROSSMAN: -- I'm sorry --

13 THE COURT: Yes.

14 MS. GROSSMAN: -- about Davis and Ligon and whether  
15 there are going to be others and we need to know.

16 THE COURT: So I think that anybody who has ideas on  
17 witnesses for this remedies hearing, certainly Ligon has had  
18 long time to think this, February 7th.

19 MS. STEINBERG: For Davis?

20 THE COURT: Well --

21 MS. STEINBERG: We haven't had an opportunity to -- I  
22 would ask for more time for Davis, because we really haven't  
23 until today.

24 THE COURT: That's not true, it's not today. I put  
25 that into --

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1 MS. STEINBERG: Into the, yes.

2 THE COURT: One of the opinions, maybe the stay  
3 opinion or one of the opinions I said, and Davis is more than  
4 invited to participate here too. So it's not today at all.  
5 When was the stay opinion issued?

6 MS. GROSSMAN: January 8th.

7 MS. COOKE: I think it was in the January 8th  
8 decision, your Honor.

9 THE COURT: Oh, I mentioned it even in the January 8th  
10 opinion?

11 MS. COOKE: Yes.

12 THE COURT: So you've been in this three weeks  
13 already. So I really think February 7th is it. Everybody  
14 better scurry on this issue of remedies.

15 MS. STEINBERG: Can I just clarify whether you're  
16 asking for experts or all of our witnesses that we're  
17 proposing? Because it's witness experts, I think.

18 THE COURT: Certainly experts I would think it's  
19 common, it's common, there isn't going to be one in this case,  
20 one in this case and one in this case. This was the point of  
21 doing it this way; get together if you have an expert and  
22 that's it.

23 MS. STEINBERG: I think.

24 THE COURT: Now, as far as other kinds of witnesses, I  
25 don't know what other kinds there would be, if we're not going

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1 into the specific issues of vertical patrols that relate solely  
2 to Housing Authority buildings. We're trying to talk about the  
3 police department and basically stop and frisk policy in  
4 general, not the specifics of what they can or can't do inside  
5 a Housing Authority building. That was one of the earliest  
6 points Ms. Grossman made and I agreed with her. I don't want  
7 to make this more confusing than it already is.

8 So I would say all the common witnesses. This would  
9 not limit your right when we get around some day to trying the  
10 case on liability, and see if there are more people on the  
11 specific issues relating to your specific concerns of Housing  
12 Authority buildings, because that's not part of this  
13 consolidated hearing.

14 That would be true of Ligon too and the end of the day  
15 when there's a full trial on all issues, there may be other  
16 people on remedies then, because they're peculiar to inside  
17 stops, in town buildings, which is not part of this.

18 MS. KARTERTON: We understand, your Honor. We just  
19 like to note that we had not considered putting on additional  
20 witnesses until we received your opinion earlier this month,  
21 and so we feel like identifying additional witnesses within one  
22 week would be short notice.

23 THE COURT: You may not need any, you may have been  
24 satisfied as it was. We tried the case then, the PI hearing  
25 and I called for submissions on February 22nd directed to

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1 remedies. Nobody's asking you to call any additional  
2 witnesses. You may say, look, this poor Judge, we don't want  
3 her suffer any more; she'll hear what she hears in Floyd, it's  
4 all the same, we don't have to burden her. But I want you all  
5 to have a big meeting in somebody's conference room and get  
6 this done once. Not necessarily any additional witnesses.  
7 We'll see.

8 MS. GROSSMAN: Your Honor, I note on the joint  
9 pretrial order, since we're just on the topic.

10 THE COURT: Yes.

11 MS. GROSSMAN: I would just ask that the plaintiffs  
12 provide us that next week so that we can then --

13 THE COURT: When were they due to provide it to you?

14 MS. GROSSMAN: You didn't order, but I think it was  
15 contemplated it can be staggered we need at least a week to  
16 look at their, you know, joint pretrial order.

17 THE COURT: So the date was February 19th?

18 MS. GROSSMAN: To the Court.

19 MR. CHARNEY: Your Honor, we --

20 THE COURT: So then I'll move the date a week that  
21 way. In other words, they can produce theirs on the 19th,  
22 usually it's staggered, usually the plaintiffs give their  
23 version to the defense, and then defense adds theirs to the  
24 plaintiff's version. That's the way I do it in every other  
25 case. So that can just wait till the 26th.

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1 MS. GROSSMAN: Okay.

2 THE COURT: So the 19th comes from plaintiffs, the  
3 26th comes the joint, and you add your portions.

4 MS. GROSSMAN: Your Honor, I would just ask if we have  
5 till the 27th.

6 THE COURT: Sure.

7 MS. GROSSMAN: It's one extra day.

8 THE COURT: Sure. It's no makes no difference to the  
9 Court.

10 Okay. Is there more we should talk about in the  
11 remedies portion of this conference, because the remainder of  
12 the conference relates solely to discovery disputes in Floyd,  
13 with one exception, the Ligon plaintiffs asked for a schedule.  
14 Yes, I will do that first, so hopefully the other two cases can  
15 feel free to go away.

16 MS. GROSSMAN: Your Honor, just in terms of the page  
17 limits and the submissions on remedy.

18 THE COURT: Yes.

19 MS. GROSSMAN: Are you expecting declarations or any  
20 submission that we're -- we think would.

21 THE COURT: I would actually hope not. We're going to  
22 have a trial and it's non-jury. I don't see why I need a  
23 declaration. I'm not deciding a motion.

24 MS. GROSSMAN: Okay.

25 THE COURT: Just the people want to brief the law or  
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1 just give their ideas or their oppositions to ideas, that's  
2 fine.

3 MS. GROSSMAN: Okay.

4 THE COURT: That helps the Court. But I don't know  
5 why I would need a declaration now. I'm going to hear live  
6 from these people, especially on the defense side we're going  
7 to call people to talk about I guess the burdens and other such  
8 things. All right.

9 Is there more on remedies, before I turn to scheduling  
10 in Ligon, and then excuse the Ligon and Davis plaintiffs, at  
11 least from the table? If they want to stay in the room they're  
12 welcome, it's a public courtroom, but let's do the schedule.  
13 What are you proposing Mr. Ms. Karterton, have you talked to  
14 the defense? Usually there is a meeting conferring on  
15 schedule.

16 MS. KARTERTON: Yes, I did confer with Mr. Zuckerman  
17 yesterday and he indicated that he was not yet ready to advise  
18 or position on dates.

19 THE COURT: I can't do that, Mr. Zuckerman. In every  
20 other case I set a scheduling order.

21 MR. ZUCKERMAN: Well, I talked to Ms. Karterton.  
22 We're okay with the June 30th discovery cut off.

23 THE COURT: Okay, good. I order June 30th fact  
24 discovery cut off. What else?

25 MS. KARTERTON: I would note June 30th is actually a  
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1 Sunday. June 28 perhaps?

2 THE COURT: June 28, perhaps. Fine, June 28 fact  
3 discovery cut off. Is there a date for expert discovery? You  
4 had a proposal, I think.

5 MS. KARTERTON: Yes, we propose September 27th.

6 THE COURT: Really, you need --

7 MS. KARTERTON: 90 days?

8 THE COURT: 90 days for expert discovery. Mr.  
9 Zuckerman, what's your view of that? It seems long to me.

10 MR. ZUCKERMAN: Well, it wasn't clear on whether the  
11 plaintiffs were going to make their disclosures first and then  
12 we would have rebuttal disclosures?

13 THE COURT: I guess so. But the point is that it  
14 would make them, they produce reports, and there would be  
15 deposition, you might have experts reports. So if you also  
16 agree that 90 days is not too long, I guess I'll live with it.

17 MR. ZUCKERMAN: No, 90 days is fine. It's fine.

18 THE COURT: I think it's long. Anyway,  
19 September 27th.

20 MS. KARTERTON: Yes, your Honor.

21 THE COURT: That is very long.

22 MR. ZUCKERMAN: I just want to be clear, is that for  
23 plaintiff's experts?

24 THE COURT: No, no that's all expert discovery.

25 MR. ZUCKERMAN: All expert discovery.

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1 MS. GROSSMAN: Your Honor, may I just be heard on the  
2 expert -- as you have seen with Davis and Floyd, I mean there  
3 is similarities with the type of expert reports.

4 THE COURT: Well, certainly Dr. Fagan, always seem to  
5 get him, yes.

6 MR. CHARNEY: And Professor Smith.

7 THE COURT: What?

8 MR. CHARNEY: We always get Professor Smith too.

9 THE COURT: That's true too.

10 MS. GROSSMAN: So when you look at the breadth of the  
11 analysis, I don't know that 90 days is necessarily  
12 unreasonable.

13 THE COURT: Oh, I wasn't objecting to it. I didn't  
14 love it, but -- I said I was going to live with it. I said I  
15 was going to live with it. I wasn't fond of it.

16 MR. ZUCKERMAN: I just wants to be clear on when the  
17 plaintiff's disclosures are due.

18 THE COURT: I hadn't set the dates within the 90  
19 because you haven't met and conferred. I want to ask you to  
20 try to do that yourselves by giving you the outside date and  
21 ask you if you could please try to work out interim dates of  
22 when they disclose and when the reports are exchanged, when the  
23 deposition, et cetera. All I care about is the cut off.

24 MS. KARTERTON: Your Honor, the other thing we would  
25 ask for is a date for initial disclosures. As odd as it may

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1 see, we have not actually formally exchanged --

2 THE COURT: Yes, that is odd. What do you propose?

3 MS. KARTERTON: No rushing, maybe February 28.

4 MR. ZUCKERMAN: Your Honor, the issue that we have  
5 with initial disclosures, I mean, everybody's been disclosed  
6 and deposed and all the documents have been produced.

7 THE COURT: We did have a preliminary injunction. It  
8 seems like this is a case where 26(a) could be waived.

9 MS. KARTERTON: Well, your Honor, we'd be concerned in  
10 part because there are numerous incidents at issue in the case  
11 that were not part of the PI hearing and other witnesses that  
12 now the City they may be aware of that we don't know the  
13 identity of yet.

14 THE COURT: Maybe it's a really good thing that you  
15 make initial disclosures, and when the defendants see your  
16 initial disclosures, they can figure out if they have  
17 disclosures under the rules that should be made, but the status  
18 of case now I don't know what they would disclose they the  
19 haven't already disclosed. There has been a lot of water under  
20 the bridge in the Ligon case. So why don't you make additional  
21 disclosures by February 28. So he's got a lot to do. And  
22 after they receive it, Mr. Zuckerman, would you make a proposal  
23 as to what when you should make initial disclosures and  
24 response, because it may actually put you on notice of some  
25 specifics where you should disclose witnesses with knowledge,

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1 they may give you a particular incident you could figure out  
2 who the officers were, whatever maybe appropriate to disclose  
3 them. So just make a proposal after you get it.

4 MR. ZUCKERMAN: Sure. I would think that our proposal  
5 would be things that are new, though.

6 THE COURT: Correct, of course.

7 MR. ZUCKERMAN: Yes.

8 THE COURT: But pick a date after you see what you  
9 get. I don't know if it's going to be voluminous or not  
10 voluminous. When you get it, please make a proposal.

11 MR. ZUCKERMAN: Sure.

12 THE COURT: Don't forget a lot to do.

13 All right, what else in Ligon? We have class cert.  
14 motion pending now. Do we expect summary judgment motion  
15 practice? You don't.

16 MR. MOORE: Not any time soon.

17 THE COURT: Not from the defense, but -- the  
18 plaintiffs -- what about the defendants?

19 MR. ZUCKERMAN: It would certainly be a possibility.  
20 There are a lot of individual claims, you know, that --

21 THE COURT: Right. We've been down the road on two  
22 other cases now.

23 MR. ZUCKERMAN: I mean we haven't totally considered  
24 that at this point, but there are a lot of individual --

25 THE COURT: Put it this way, it doesn't depend on fact

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1 discovery, I mean -- sorry -- expert discovery. Motion  
2 practice doesn't depend on expert discovery. So we should have  
3 a premotion conference on summary judgment in July after, well  
4 after the close of fact discovery. I'm just going to pick a  
5 date in July to see you on that case. This is obviously a  
6 random choice. Tuesday, July 23rd at 4:30.

7 MR. ZUCKERMAN: It's fine, your Honor.

8 THE COURT: All right. That will be -- I guess  
9 summary judgment premotion conference, usual rules apply. You  
10 have to get a letter in, that's why I gave you several weeks  
11 after the close of discovery, one doesn't have to wait till the  
12 last day at the end of discovery to start thinking about their  
13 letter.

14 All right, is there any other scheduling issue should  
15 be done in Ligon, or does that give you broad outlines of what  
16 you need?

17 MS. KARTERTON: That's everything we want to raise,  
18 your Honor.

19 THE COURT: All right. Anything about Davis peculiar  
20 at this time? Where are we up in Davis?

21 MS. KUNZ: Your Honor, we are awaiting a decision on  
22 the Monell summary judgment motions by both defendants and our  
23 cross motion for summary judgment, partial summary judgment,  
24 then --

25 THE COURT: Is that all fully submitted?

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1 MS. KUNZ: I'm sorry, yes, as of the 18th, your Honor.

2 THE COURT: Oh, of January.

3 MS. KUNZ: Yes.

4 THE COURT: All right.

5 MS. KUNZ: And then, as your Honor knows, you ordered  
6 that we not proceed to class certification until after those  
7 motions were decided. We are prepared to do so right after  
8 those are decided.

9 THE COURT: And then you'd be looking for a trial  
10 date.

11 MS. KUNZ: That's correct.

12 MR. MOORE: How about March 18th, Judge?

13 THE COURT: No, no. I don't wish to consolidate  
14 liability phase of the two trials, okay.

15 All right, so Ligon and Davis are excused, at least  
16 counsel table so that the rest of the Floyd lawyers can join  
17 their colleagues. You of course are welcome to stay.

18 All right, let's see if I know who are at counsel  
19 table. I forget a lot of names so obviously Mr. Moore,  
20 Mr. Charney, Ms. Borchetta, and I forgot

21 MS. PATEL: Miss Patel.

22 THE COURT: Patel.

23 MS. MARTINI: Kasey Martini from Covington & Burling.

24 THE COURT: Ms. Martini.

25 MR. CHARNEY: Yes. All right.

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1 THE COURT: All right.

2 There have been a couple of letters exchanged with  
3 regard to discovery disputes. I have a plaintiff's  
4 January 29th letter, defendant's January 29th letter. I don't  
5 think I've written responses to either side's letter, is that  
6 right, which is fine?

7 MR. CHARNEY: Your Honor, defendant's letter did  
8 respond to ours, but you told us that you didn't want a  
9 response from us.

10 THE COURT: Right, that's right.

11 MR. CHARNEY: So.

12 THE COURT: That's right.

13 Okay. Let's start with the request for -- the request  
14 that plaintiffs have made of defendants to provide information  
15 concerning unsubstantiated Internal Affairs Bureau and Office  
16 of the Chief of Department Investigation that concerned alleged  
17 suspicionless stops. The theory of this is that this is  
18 relevant to the plaintiff's deliberate indifference issue.

19 The defendants point out that I dealt with the CCRB  
20 issue before, and with respect to CCRB I only allowed limited  
21 discovery of substantiated claims. But if I understand  
22 correctly, IAB and OCD are part of the police department. Is  
23 that not true?

24 MR. CHARNEY: Yes.

25 THE COURT: Yes. And the CCRB is not part of the  
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1 Police Department, it's independent of the police department.  
2 So in terms of the claim of deliberate indifference, the  
3 plaintiffs are concerned with what the police department does  
4 or says not, with what some independent body does or says. And  
5 their point is that the adequacy of investigations by the  
6 police department of its own behavior is very much a part of  
7 deliberative indifference. That's the first point.

8 Second point is I had made a statement in discussing  
9 CCRB where I said, I'm not going into every disciplinary charge  
10 or things like he was late, he was rude, et cetera. But this  
11 is -- this request relates only to alleged suspicionless stops,  
12 not complaints about particular officers, you know, I don't  
13 know what, being late, being rude or pointing their gun when  
14 they shouldn't or firing it. It's not about that. It's about  
15 alleged suspicionless stops. I have no idea over what period  
16 of time this request is made for, why it's being made now. Is  
17 this the first time it's being made? No. What is it -- who  
18 wants to speak, Ms. Borchetta.

19 MS. BORCHETTA: Your Honor, I think part of the issue  
20 is that we recently had discovery on additional officers, so  
21 that we had previous discovery on IAB and OCD investigation  
22 related to officers who were previously disclosed, but the City  
23 was now both updating the information we had regarding those  
24 previous officers, and also for the first time providing it  
25 with respect to new officers. And so we would want it, again,

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1 both updated information on unsubstantiated IAB and OCD  
2 investigation arising from allegations of a suspicionless stop,  
3 whatever --

4 THE COURT: But are you talking about the entire New  
5 York City Police Department over ten years or are we talking  
6 about only the officers?

7 MS. BORCHETTA: Your Honor, only the officers that are  
8 involved in the stops that we're challenging.

9 THE COURT: I see. So how many?

10 MS. BORCHETTA: Over a ten year period.

11 THE COURT: 10 year period.

12 MS. BORCHETTA: Correct, your Honor.

13 THE COURT: How many such officers are there, roughly.

14 MS. BORCHETTA: I could count them right now, your  
15 Honor. I believe it's approximately 15.

16 MS. PUBLICKER: Your Honor, if I may, I believe the  
17 number is closer to 40.

18 THE COURT: It's an interesting dispute right there,  
19 15 or 40. Ms. Borchetta?

20 MS. BORCHETTA: I think it's like --

21 MR. CHARNEY: I guess -- one of the parts we're  
22 confused about is, are you asking all the officers that we  
23 already received information for or just the newly --

24 THE COURT: All the officers who you would like the  
25 City to search for IAB and OCD investigations of alleged

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1 complaints of suspicionless stops, all the ones you want them  
2 to look for.

3 MS. GROSSMAN: Your Honor, while the plaintiffs are  
4 looking, can I just make one -- just address the court?

5 THE COURT: Sure.

6 MS. GROSSMAN: Remember where this came up. This came  
7 up in the context of the motions in limine when we, in January,  
8 on January 4th we had a conference, and we asked the Court and  
9 we moved in limine on disciplinary related documents like CCRB,  
10 IAB.

11 THE COURT: I certainly know we've covered CCRB.

12 MS. GROSSMAN: And IAB and other disciplinary related  
13 documents. Our argument to you, when we were arguing  
14 admissibility, is that we'd like to move in limine, and in  
15 consideration of past rulings that you've made of  
16 unsubstantiated CCRB complaints and IAB has not generally --

17 THE COURT: But this information, as I understand it,  
18 is not about the officers. It's about the quality of the  
19 police department investigating claims of suspicionless stops.  
20 So it's quite a different thing. In terms of the motion in  
21 limine you're saying police officer shouldn't have to explain  
22 away, so to speak, or be challenged by unsubstantiated  
23 allegations, and I agree with that then, I agree with it now.  
24 It's not part of cross-examination of the police officer, you  
25 know, isn't it true you did this on this, this date. These are

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1 unsubstantiated allegations.

2           What they want to talk about here is, there's an  
3 allegation of a suspicionless stop, what did the IAB or OCD do.  
4 Maybe they did a lot, maybe they did nothing, maybe they did  
5 something in between. It's a non-jury trial. I'm not worried  
6 about the prejudicial overflow in terms of the officer not  
7 worried about the complaint being made. I think I can separate  
8 that. I know what un-substantiate is. But they want to see  
9 what were the investigative steps that were undertaken as part  
10 of their proof of deliberate indifference. So what I really  
11 don't know yet is the burden part. I don't know if these  
12 records are electronically maintained? Ms. Publicker, do you  
13 know that? Are they electronically retained, are they  
14 searchable by name? Can the IAB and OCD records be searched,  
15 you know, somebody has a unique name like Borchetta, can you  
16 search a data base to see if IAB or OCD has a file on an  
17 Officer Borchetta, which is at least a unique name, unlike  
18 Smith or Jones, but we'll get to that, there may be Smith and  
19 Jones. But can it be searched, do you know?

20           MS. PUBLICKER: I can't speak to --

21           THE COURT: All right, so that's the first thing you  
22 should find out, the burden portion of this. I don't know if  
23 it's easy or hard. When you get the list of names and I think  
24 the first thing you need to do, maybe Borchetta, first thing  
25 you should do is produce the list of names that you want the

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1 City to search, then we'll figure out if it's 15 or 40, produce  
2 the list of names tomorrow. There is no reason to take longer  
3 than over night to produce the list of names. Then when you  
4 get that, Ms. Publicker, you'll find out if it's electronically  
5 searchable, if so, over what period of time they maintain  
6 records electronically. Maybe it only became electronically  
7 maintained five years ago, not ten years ago. The older  
8 records are not searchable in that way. When I know that  
9 answer, you know, I'll figure out what I can do. I can always  
10 see you on short notice.

11 But I can say for the sake of argument, that if it's  
12 electrically searchable, I would ask you to find records, IAB  
13 or OCD investigations, as to the list of names they give and  
14 we'll take it step by step from there. But I don't have enough  
15 information now to rule.

16 MS. GROSSMAN: Your Honor, I'd just like to add that  
17 this is exactly what was briefed in the motions in limine.

18 MR. CHARNEY: No, it's not.

19 THE COURT: Mr. Grossman, I've answered you twice,  
20 this does not go to cross examining the officers. They're not  
21 going to be asked to explain these stops, not at all.

22 MS. PUBLICKER: Your Honor --

23 THE COURT: The issue is what did IAB or OCD do,  
24 because they are the police department.

25 MS. GROSSMAN: I know you, but you -- Mr. Charney made  
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1 that argument at the January 4th conference, I have it right  
2 here. The third category we think is important to Monell is  
3 when it comes to civilian complaints, there are several  
4 different agencies that will investigate them, CCRB which we  
5 know about, but then there are two internal NYPD departments.  
6 There is the Office of Chief of Department and the IAB, the way  
7 that they investigate, the extent to which they investigate,  
8 the quality of those investigations. We think this is  
9 relevant. Court: Denied. I am not going into every  
10 disciplinary charge. That's what you had said.

11 THE COURT: I'm not going into every disciplinary  
12 charge with the officers. I still say that. This is a  
13 different issue that I'm hearing now. If I was wrong then, the  
14 good thing about motions in limine is that the Federal Rules of  
15 Evidence say this, explicitly or is it civil procedure?

16 MR. CHARNEY: I --

17 THE COURT: One or the other. It says can be  
18 revisited any time, all rulings on MILs are preliminary, all  
19 could be revisited any time throughout the trial. It's in the  
20 rule itself. I'll read it to you if you wish me to once I  
21 figure out if it's in criminal or civil procedure. I guess  
22 it's civil procedure, but it says it flat out.

23 MS. BORCHETTA: Your Honor, also the portion of the  
24 record that they're repeating here today, we submit is not the  
25 entirety of your decision. The entirety of your decision did

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1 not preclude this finding here and is not inconsistent with it.

2 THE COURT: Who is going to help me find the rule? I  
3 know the rule. I know it says -- it may be to say -- that's  
4 why I think civil procedure --

5 MS. COOKE: May we have a moment, your Honor?

6 THE COURT: It doesn't matter, because I know it says  
7 that, but I like to find it.

8 MR. CHARNEY: Your Honor, I don't know if this will  
9 help, but I --

10 THE COURT: I just want to find it. I know exactly  
11 what I said.

12 MR. CHARNEY: I think you're right, but --

13 THE COURT: I know I'm right. I just want to read the  
14 language into the record. I know I'm right. Nobody wants to  
15 help me find it.

16 MR. CHARNEY: We didn't bring our books. Sorry.

17 THE COURT: Oh, I have lectured and lectured that  
18 people need to bring their books.

19 MR. CHARNEY: They will definitely be here for trial  
20 for sure. But I don't know about now.

21 THE COURT: So embarrassing.

22 MS. GROSSMAN: Your Honor, I'd just like to say that  
23 in light of your ruling on January 4th, it seems like this was  
24 a non-issue in terms of witnesses who may need to --

25 THE COURT: Well, this is getting counter productive  
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1 until I can read the rule to you, unless you agree that I know  
2 exactly what it says. MIL rulings are never final, can be  
3 revisited through the trial at any time, any time. Nobody  
4 knows how to find -- I'm having trouble finding it. I know it  
5 says that. So actually, I'm not going to say another word  
6 about it until I can read the rule into the record. We're all  
7 going to have to sit here while I find it.

8 All right, I failed. I cannot find the text right  
9 now, but I know what the rule says, and that's the end of it.  
10 I will find it. It won't be in the record today.

11 MS. GROSSMAN: Your Honor --

12 THE COURT: But the short answer is I said the word  
13 denied. I changed my mind. I want to see what there is in  
14 terms of IAB and OCD with respect to these officers. Send the  
15 names over, find out if this is electronically searchable. I  
16 will address Burton when I hear more about it. I don't know if  
17 there is five of these or 100 of these. I just don't know what  
18 we have till I gain the information. So that's the end of this  
19 for now.

20 MS. GROSSMAN: Your Honor, I understand your ruling.

21 THE COURT: Good.

22 MS. GROSSMAN: I just want to make one point; that is,  
23 because we understood your ruling to be different than it is  
24 today, we may need to reserve the right to call, you know,  
25 identify another witness that might address that, so I just

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1 don't want to be precluded.

2 THE COURT: That's true.

3 MS. GROSSMAN: Or --

4 THE COURT: That's fair.

5 MS. GROSSMAN: Yes.

6 THE COURT: I'll be happier when I find the rule.

7 Yes?

8 MS. BORCHETTA: Your Honor, we would just ask for some  
9 deadline by which we would receive from them information about  
10 the burdens so we can move this forward, because we do have to,  
11 if there are additional documents --

12 THE COURT: You're going to give them the names  
13 tomorrow? Is there any reason you can't write a letter, Ms.  
14 Publicker, by the end of Tuesday just answering the questions  
15 about just answering the questions about whether the records  
16 are maintained and searchable electrically, that's the big  
17 question. And, therefore, what the burdens would be in finding  
18 this material?

19 MS. PUBLICKER: That shouldn't be a problem, your  
20 Honor.

21 THE COURT: Okay. So I'll know at least the answer,  
22 then I can always convene a telephone conference or some other  
23 way to continue this conversation. I'm sure I'll locate the  
24 rule by then too.

25 MR. MOORE: I think they are -- in my experience, I  
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1 think it is electronically maintained. There is a central  
2 personnel index file on all police officers that list  
3 disciplinary actions, both from IAB and CCRB and I believe OCD.  
4 So, to the extent that helps the City direct their search.

5 THE COURT: Okay.

6 The second issue. The plaintiffs want a 30(b)(6)  
7 witness to testify about the NYPD's recent development  
8 implementation of operations order 52, and three other recently  
9 enacted policies that the plaintiffs believe are relevant to  
10 the issue of quotas. The plaintiffs say this is timely -- even  
11 though it doesn't sound timely -- because documents related to  
12 these policies were first produced in June. Plaintiffs tried  
13 to obtain information they seek from very recent depositions of  
14 police officers who apparently didn't have the information. So  
15 I don't remember what operation order 52 is. What is this?

16 MS. GROSSMAN: Your Honor, this was a subject of an  
17 in-camera review that you conducted in June, and it was  
18 operations order regarding performance activity that documented  
19 what officers were doing and conditions that they were  
20 addressing as they went out to do their job, and so --

21 THE COURT: What did I do after I looked at it  
22 in-camera?

23 MS. GROSSMAN: You, basically, grant -- you issued a  
24 protective order saying that the discovery of deliberative  
25 process documents shouldn't be turned over, but you -- but the

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1 plaintiffs did have the operation order back in June.

2 THE COURT: They do?

3 MS. GROSSMAN: They had it back then, and they had  
4 documents related to that that we turned over that were not  
5 subject to deliberative process privilege.

6 THE COURT: Okay.

7 MS. GROSSMAN: They have known about this issue for --

8 THE COURT: Right. But they said they tried to ask  
9 the questions of police officers who didn't have the  
10 information that they requested.

11 MS. GROSSMAN: What we represented to the plaintiffs  
12 is that the detectives who were deposed, they're not subject to  
13 this operations order, and so we represented, and that's why  
14 the detectives who were deposed, did not --

15 THE COURT: Okay.

16 MS. GROSSMAN: -- have information to add.

17 THE COURT: Okay.

18 MS. GROSSMAN: Now, there were other officers who I  
19 believe were asked questions, and apparently the plaintiffs  
20 believe that there's some confusion about what the officers had  
21 to say at their deposition, but that was in December.

22 THE COURT: Confusion or they didn't have the  
23 information?

24 MR. CHARNEY: Your Honor, can I respond?

25 MS. GROSSMAN: There was some confusing testimony, as

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1 I understand it.

2 MR. CHARNEY: Let me just --

3 THE COURT: What do you want to ask? Let's say you  
4 had this witness now on the stand, what would you ask him?

5 MR. CHARNEY: We want to ask how this order has been  
6 implemented. Just so your Honor recalls --

7 THE COURT: How it's been implemented. Wait.  
8 Nobody's answered you yet, how it's been implemented?

9 MR. CHARNEY: No. Because when we asked the officers  
10 who are subject to it --

11 THE COURT: Right.

12 MR. CHARNEY: -- their testimony is, once we hand in  
13 the form, we don't know what happens to it, our supervisors  
14 never talk to us about it even though the order specifically  
15 says the supervisor should talk to them about it, said they  
16 don't know what is done with it, they don't know how it's used.

17 THE COURT: So it would be a higher up person to talk  
18 about --

19 MR. CHARNEY: Just explain how this whole process  
20 works.

21 And the other thing which Ms. Grossman left out, your  
22 Honor, is your Honor cited to this order in her class cert.  
23 decision. It's a very important order, this is highly  
24 relevant.

25 THE COURT: I know. It's all very vague in my memory

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1 but what about you said also more recent, three other recent --  
2 MR. CHARNEY: They were all implemented around the  
3 same time, which was in the fall of 2011 after discovery had  
4 closed. We asked for this information. We actually asked for  
5 information related to quotas four years ago. But in any  
6 event, they produced the documents in June. We have tried to  
7 use these officer depositions to ask about this to, you know,  
8 because -- you know, as your Honor has said, we don't want to  
9 have 100 deposition. So we thought we'd try to use the ones we  
10 already had. Problem is these officers, either some of them  
11 aren't subject to the order, others who are don't really know  
12 anything other than I filled out the form, I handed it in, I  
13 don't know what happens to it.

14 THE COURT: You already said that. So you want  
15 somebody who is knowledgeable about how the order's implemented.

16 MR. CHARNEY: Yes.

17 THE COURT: How it's carried out. But does that apply  
18 to all these orders, 52 and the three -- it could be all one  
19 person.

20 MR. CHARNEY: Because they're all related.

21 THE COURT: Could be all one.

22 MR. CHARNEY: The reason we know they're all related  
23 is because operations 52 makes reference.

24 THE COURT: You agree it could be all one person.

25 MR. CHARNEY: Well, I don't know if the City's going

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1 to say they can -- just one witness knows everything. I think  
2 it can probably be one person, but that's not my decision to  
3 make. That's the City's.

4 THE COURT: Wouldn't it be some higher --

5 MR. CHARNEY: I think it would be.

6 THE COURT: -- person?

7 MR. CHARNEY: I think it would be, yes, it would be.

8 But as your Honor knows --

9 THE COURT: Who do you suspect would be somebody who  
10 would know that?

11 MR. CHARNEY: I think it could, for example, be the  
12 Chief of Patrol, the Chief of Department. It could be someone  
13 from Chief of Department's Office or the Chief of Patrol's  
14 Office, the. Documents that Mr. Grossman was referring to that  
15 were subject to in-camera review included a list of people who  
16 were on this committee that really devised this order. And so  
17 I'm sure any of those individuals should be able to tell us how  
18 it's supposed to be implemented.

19 THE COURT: And you really haven't had anybody clearly  
20 tell you that yet.

21 MR. CHARNEY: No, because the only higher ups that we  
22 deposed were deposed in 2010 before this order came out.

23 THE COURT: Nobody higher up has been deposed since  
24 these were issued.

25 MR. CHARNEY: Exactly.

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1 MS. GROSSMAN: Your Honor, they've had sergeants and  
2 lieutenants that they've deposed and when --

3 THE COURT: I'm sure. They think said nobody's higher  
4 has been deposed since these were implemented?

5 MS. GROSSMAN: No, no. They have recently deposed  
6 sergeants and lieutenants.

7 THE COURT: I don't know sergeant, there is lots of  
8 sergeants, I don't know the sergeant is high enough up to say  
9 how these new directives are being implemented by the New York  
10 City Police Department across the board.

11 MS. GROSSMAN: Implemented. What the operations order  
12 requires is that a sergeant after seven days they look at the  
13 activity of an officer, they have -- they engage with the  
14 officer. They determine what is it that it is the officer --  
15 what condition is the officer going to be addressing on his  
16 tour. And then the expectation is that the officer is going to  
17 tailor his activity to the condition that's going to be  
18 addressed; for example, if there is a shooting spree or if  
19 there is a robbery pattern, the activity, there is discretion  
20 given to the officers to go out and tailor their enforcement to  
21 address that condition. And so what happens is it's a  
22 variation of procedure that was -- I'm sorry. So implementing  
23 is what is the sergeant doing and what is the Lieutenant doing,  
24 and then --

25 THE COURT: So you got to get higher than the sergeant  
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1 and lieutenant, so one person speaks for the entire department.

2 MS. GROSSMAN: What happens is that like, like other  
3 activity and documents, it's then sent up the chain of command  
4 and then --

5 THE COURT: It sounds like a Chief of Patrol should  
6 testify.

7 MS. GROSSMAN: No.

8 THE COURT: Well, look, it sounds to me like someone  
9 higher in the department for two hours should simply explain  
10 the implementation of these group of orders and be done with  
11 it. And, again, a higher up will speak for the whole  
12 department as to implementation of these procedures. Surely  
13 you can get this done in two hours.

14 MS. GROSSMAN: Well, your Honor, I would just ask --

15 THE COURT: Is that not right, Mr. Cherney?

16 MR. CHARNEY: If that's --

17 THE COURT: It can't go on forever.

18 MR. CHARNEY: I understand.

19 THE COURT: These cases have to come to conclusion  
20 I'll give you two hours. You should produce a Chief of patrol  
21 Or higher.

22 MS. GROSSMAN: I don't know who would be best to  
23 answer.

24 THE COURT: Look into it. If you start too low, there  
25 will be another dep and another dep and another dep. Pick

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1 somebody who understands it from the top down. Even you said  
2 the sergeant, the lieutenant tells somebody. Pick a high  
3 enough person, probably Chief of Patrol, that's what his guess  
4 was, you can talk about implementation across the department of  
5 these new orders, for two hours and be done, in and out.

6 MS. GROSSMAN: Your Honor, I do want to ask one thing  
7 on that.

8 THE COURT: Yes.

9 MS. GROSSMAN: I would ask the plaintiffs at least  
10 give me some of the questions --

11 THE COURT: I agree.

12 MS. GROSSMAN: -- so that --

13 THE COURT: This is so late in the game.

14 MS. GROSSMAN: -- and so --

15 THE COURT: It's a 30(b)(6) and they're supposed to do  
16 that in the notice.

17 MR. CHARNEY: Your Honor, we --

18 THE COURT: There is no reason to play games. Give  
19 them the questions, write them out and send them over so they  
20 know what you're going after. There is no reason to hide the  
21 ball. Write out the questions. They're right.

22 all right. Now, number three says permission to use  
23 designated deposition testimony --

24 MS. GROSSMAN: I'm sorry, I'm sorry.

25 THE COURT: That's all right.

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1 MS. GROSSMAN: In order to get this date done, I need  
2 to have the questions by date certain so then I know I can roll  
3 around and find a witness, so I won't know until I get the  
4 questions.

5 THE COURT: Correct. When can you have the questions?

6 MR. CHARNEY: Your Honor, could we have until --

7 THE COURT: At least, the least number of days  
8 possible.

9 MR. CHARNEY: Your Honor, I guess the problem is that,  
10 you know, I mean -- well --

11 THE COURT: It is not a preclusion.

12 MR. CHARNEY: No, I understand.

13 THE COURT: Obviously there are follow-up questions.

14 MR. CHARNEY: Okay.

15 THE COURT: Obviously if a question is not on the list  
16 doesn't mean you can't ask it, but write out as many as you can  
17 so they can tell the person what you're really looking for. It  
18 doesn't mean you can't ask a questions not on the list.

19 MR. CHARNEY: One week, your Honor?

20 THE COURT: One week from today. You'll have the list  
21 by February 7th.

22 Now, plaintiffs seek permission to use designated  
23 deposition testimony of non-party witnesses in their  
24 affirmative case, rather than live testimony.

25 MS. GROSSMAN: You know, your Honor, I think that

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1 first of all if we want to call those witnesses --

2 THE COURT: That's different. They want to use it on  
3 their case. I don't see why they can't.

4 MS. GROSSMAN: Absolutely. If they want to use it  
5 on -- we'd like to see the designation.

6 THE COURT: Yes, sure.

7 MR. CHARNEY: Of course.

8 MS. GROSSMAN: But our view is that we are probably  
9 going to call those witnesses, so I don't know there a.

10 THE COURT: You know lawyers like to use deposition  
11 testimony because it's pinned down. They know what it says.

12 MS. GROSSMAN: I understand that, but --

13 THE COURT: I think the rules support that. They can  
14 offer.

15 MR. MOORE: We're trying to figure out a way to make  
16 it more efficient to.

17 THE COURT: I can't do that, because if they wish to  
18 call, they have the right to call them.

19 MR. MOORE: No, I understand.

20 THE COURT: And you can do it.

21 MR. MOORE: Presumably --

22 THE COURT: But you --

23 MR. MOORE: -- what's happening in most cases, if you  
24 can designate the testimony of certain witnesses, both sides  
25 designate, that makes it easier for everybody. That's --

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1 THE COURT: Good point, Mr. Moore, but they can't be  
2 compelled. They can call --

3 MR. MOORE: Nobody is trying to compel --

4 THE COURT: That's right. So if they wish to call  
5 them live, they will. But yes, the answer is you won the  
6 motion. You may offer the deposition testimony.

7 MS. GROSSMAN: But, your Honor, I can say if they give  
8 us the designation --

9 THE COURT: They will.

10 MS. GROSSMAN: And then identify who the witnesses  
11 are, we will give due consideration to that.

12 THE COURT: Thank you. That's what Mr. Moore was  
13 suggesting.

14 MS. GROSSMAN: When will we get that?

15 THE COURT: That's exactly what he suggested, that you  
16 consider counter designating and being done Gene with those  
17 people.

18 MS. GROSSMAN: We just need a date certain to get that  
19 to us to be able to --

20 MS. BORCHETTA: Your Honor, ordinarily deposition  
21 designations would be a part of the JPTO, so we submit.

22 THE COURT: February 19th.

23 MS. BORCHETTA: Yes. Thank you, your Honor.

24 THE COURT: That takes us to defendant's January 29th  
25 letter. They seek an order precluding plaintiffs from calling

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1 at deposition or trial the four police officers who defendants  
2 are telling you can not recall the Nicholas perp stop on  
3 August 5, 2006. If they don't recall it, then what is the  
4 point? We had years of discovery, why depose them?

5 MS. BORCHETTA: Your Honor, we have a very good  
6 answer, which is that we don't want to. If the plaintiff --  
7 the defendant did not come to us about this with sufficient  
8 time before coming to the court. We would agree not to depose  
9 or call the following people related to the perp stop on the  
10 condition we get an affidavit, no personal knowledge. Diana  
11 Fontanez. But with respect to Officer Fontanez, we had  
12 previously said to the City that we would accept an affidavit  
13 on the condition that it also includes a statement from her  
14 that certain CCRB statements that she's provided were accurate.  
15 And they agreed to do that if we weren't calling her. So we  
16 would ask with respect to Officer Fontanez an affidavit both  
17 that she has no personal knowledge and that her statements to  
18 CCRB were accurate. And then a statement of no personal  
19 knowledge from Officers Lantigua, Frykberg.

20 THE COURT: What was the --

21 MS. BORCHETTA: I believe it's Frykberg, Frykberg.

22 MR. CHARNEY: Frykberg.

23 MS. BORCHETTA: Frykberg.

24 THE COURT: Wait, wait. I'm sorry. We did not get  
25 the name. You said Frykberg?

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1 MS. BORCHETTA: F-r-y-k-b-e-r-g.

2 THE COURT: Okay. And then?

3 MS. BORCHETTA: And Condon, C-o-n-d-o-n.

4 THE COURT: Okay. Is that acceptable to the City?

5 MS. GROSSMAN: I didn't -- she spoke very quickly and  
6 I could not hear. Sorry. I think I heard Fontanez.

7 THE COURT: She wants three affidavits of no  
8 knowledge, with the fourth person she wants an affidavit of no  
9 knowledge and that the CCRB statement was truthful.

10 MS. GROSSMAN: I just need to hear her say the names  
11 again.

12 THE COURT: Oh.

13 MS. BORCHETTA: Your Honor, I'll speak more slowly,  
14 Fontanez, we want the affidavit saying --

15 THE COURT: We got that. She wants to hear the four  
16 names.

17 MS. BORCHETTA: Lentigua, L-a-n-t-i-g-u-a, Frykberg,  
18 which I previously spelled, and Condon, C-o-n-d-o-n.

19 THE COURT: All right, that was half the City's  
20 letter. The other half said they want an order precluding  
21 plaintiffs from calling four supervisors of officers involved  
22 in class member witnesses stops. Why is that? And what's  
23 your -- well, you're right, let me hear from you first.

24 MS. BORCHETTA: Your Honor, if I may, because I think  
25 we can dispose a lot of this as well --

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1 THE COURT: Okay, good.

2 MS. BORCHETTA: -- quickly. We would agree not to  
3 call the following, and I'll say it slowly Michael Lee;  
4 Lawrence Hammond, H-a-m-m-o-n-d., and Vernon Lewis. The fourth  
5 officer that the City is asking to be precluded from the trial  
6 we would not agree to, that is Michael Loria, and as we have  
7 previously said to the City, the reason for that is that his  
8 testimony is centrally relevant. And it is centrally relevant  
9 because Sergeant Loria was the supervisor who not only was  
10 responsible for supervising an officer who conducted what we  
11 challenge as an unconstitutional stop, but also was the  
12 supervisor who reviewed and signed off on the 250 that was  
13 prepared for that stop. We've already received testimony from  
14 Sergeant Loria, that in reviewing the 250, he would not be able  
15 to conclude there was reasonable suspicion, and this is exactly  
16 one of the ways that we challenge the City's policy of relying  
17 on supervisors.

18 THE COURT: So before they asked about, you agree on  
19 three and you want to call the fourth. Sounds reasonable.

20 MS. GROSSMAN: Well, on the last -- first of all, this  
21 is an officer I think he's retired. He -- this is regarding --  
22 I believe that he has no personal knowledge of the stop. He  
23 wasn't present.

24 THE COURT: Apparently, he already testified he  
25 reviewed the 250 and found no reasonable suspicion. That's

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1 what she just represented.

2 MR. BARTOLO: Your Honor that's incorrect.

3 THE COURT: Who are you?

4 MR. BARTOLO: Joseph Bartolo. Sergeant Loria did have  
5 his deposition taken in this case. He did not indicate there  
6 is reasonable suspicion. However, the only thing he indicated  
7 was that he reviewed the 250, but that was the extent of it and  
8 basically --

9 THE COURT: Where did you get this idea, Ms.  
10 Borchetta?

11 MR. BORCHETTA: Your Honor, I got this idea because I  
12 took the deposition and I heard the testimony.

13 THE COURT: Well --

14 MS. BORCHETTA: He signed.

15 THE COURT: Mr. Bartolo, were you there?

16 MR. BARTOLO: Yes, I was at the deposition.

17 THE COURT: You can't both be right, folks. I'm not  
18 going to read the transcript. I'm going to go with the proper,  
19 he can be a witness. The other three can't. So that's  
20 resolved.

21 Now, then the plaintiffs want the defendant -- I'm  
22 sorry -- the defendants want the plaintiffs to provide  
23 defendants with information regarding Professor Fagan's  
24 methodology in how he selected a random sample. That seems  
25 right.

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1 MR. CHARNEY: Yes. Your Honor, we have been going  
2 back and forth on this for a few days, myself and the City  
3 trying to I guess from our perspective understand what it is  
4 exactly they want.

5 THE COURT: They want to know how he selected the  
6 random sample.

7 MR. CHARNEY: Yes. So we've changed some e-mails,  
8 then yesterday we've been provided with an additional file. We  
9 also provided several files.

10 THE COURT: I'm sure you're going to tell them how he  
11 selected his random, he could have used --

12 MR. CHARNEY: Exactly. The part --

13 THE COURT: Things up and down the stairs, how did he  
14 make the random sample.

15 MR. CHARNEY: So I guess the part we struggle with is  
16 we feel we've already done that. We don't know what additional  
17 information it is they need.

18 THE COURT: Well, his book will tell you at another  
19 time, offline. The answer is, you have to do it.

20 MR. CHARNEY: Of course, and we just don't understand  
21 why what's --

22 THE COURT: Fine. Then the City wants to cancel the  
23 February 12th hearing on admissibility of the recordings made  
24 by Officers Polanco and Schoolcraft, but instead they want to  
25 depose officer Schoolcraft at the same time they would have

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1 been here in court. I favor that, so I will have more time in  
2 court on the trial I start on February 11th.

3 MR. CHARNEY: I understand, your Honor. We strongly  
4 object to his deposition for three reasons. Your Honor, no  
5 this is important that you understand.

6 THE COURT: It's all important. But you have to see,  
7 Mr. Charney, how many depositions you continually ask for, the  
8 City said it's not fair it's too late, and when I think you  
9 deserve to find information out, I nonetheless say yes. By the  
10 same token, this is an important trial witness --

11 MR. CHARNEY: It is.

12 THE COURT: The City should be permitted to depose  
13 this person. I don't need to hear more.

14 MR. CHARNEY: I --

15 THE COURT: I'm going to allow the deposition.

16 MR. CHARNEY: I understand. I want to make the record  
17 clear.

18 THE COURT: You know I'm going to allow the  
19 deposition.

20 MR. CHARNEY: The first thing is the City has already  
21 been provided with a detailed affidavit.

22 THE COURT: Fine. It doesn't matter. I'm going to  
23 allow the deposition.

24 MR. CHARNEY: Okay. Well, then the last part I need  
25 to make clear is, your Honor, we don't have control over this

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1 witness.

2 THE COURT: All right.

3 MR. CHARNEY: The witness is represented by separate  
4 counsel.

5 THE COURT: Okay.

6 MR. CHARNEY: In order to get him to come to the  
7 hearing, we have had to subpoena him. He lives more than a  
8 hundred miles away from here. The only reason his lawyer  
9 waived objection was because it was under the understanding he  
10 would only have to testify about the authenticity of the tapes.  
11 I cannot guarantee and I don't have any control over his  
12 appearance or the objections his lawyer may raise. So I don't  
13 think -- it would be extremely prejudicial to the plaintiffs to  
14 suffer the burden of a decision made by a lawyer who we have  
15 absolutely no control over.

16 THE COURT: Who is this lawyer?

17 MR. CHARNEY: Richard Gilbert. He is a private  
18 attorney here in Manhattan. I can give the contact information  
19 to the defendants. But my concern is --

20 THE COURT: A hundred miles away?

21 MR. CHARNEY: No, no.

22 THE COURT: Schoolcraft.

23 MR. CHARNEY: Mr. Schoolcraft lives in Albany, New  
24 York.

25 THE COURT: Okay. I can tell you right now, you may

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1 have to go to Albany. I can't compel him to come to New York.

2 MS. GROSSMAN: Then what happens on the day of the  
3 trial?

4 THE COURT: Well, he has to be here.

5 MS. GROSSMAN: He can be compelled? I mean, I just  
6 submit your Honor that this is --

7 THE COURT: Excuse me. I cannot and will not compel  
8 him to travel to New York for deposition. The plaintiff's  
9 lawyers don't control him. I will allow the deposition. You  
10 may have to go to Albany. That's between him and his lawyer.  
11 Obviously, he can't testify at trial if he doesn't walk in the  
12 courtroom.

13 MS. GROSSMAN: Well, your Honor, I guess he was  
14 supposed to be here for --

15 THE COURT: I understand that. I made my ruling. I  
16 will allow this deposition. You may have to go to Albany. He  
17 may prefer to come to New York. Maybe he's got something to do  
18 here that -- we have good theater in this town, we do and we  
19 have other things that are attractive. So he may choose to  
20 come. He was planning to be here on the 12th any way.

21 MR. MOORE: Judge, can I also say something about  
22 this? And I know it's late and I know you've made your ruling,  
23 I'm not asking you to change it.

24 THE COURT: Good.

25 MR. MOORE: Mr. Schoolcraft has made some very

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1 important allegations of misconduct against his employers.  
2 He's currently involved in his own lawsuit. I don't want --

3 THE COURT: Wait a minute, who is he suing?

4 MR. CHARNEY: Police Department.

5 MR. MOORE: He's a police officer.

6 THE COURT: He's currently?

7 MR. CHARNEY: No. He was suspended. He may have been  
8 terminated. He has a wrongful termination lawsuit.

9 THE COURT: I understand he's suing the City. So he  
10 has a pending lawsuit.

11 MR. MOORE: There is a pending lawsuit and there is a  
12 very hotly contested lawsuit --

13 THE COURT: Okay. Does Mr. Gilbert represent him in  
14 that one?

15 MR. CHARNEY: Yes, he does.

16 MR. MOORE: He just recently changed lawyers, so.

17 THE COURT: Away from Gilbert or to Gilbert?

18 MR. MOORE: To Gilbert.

19 THE COURT: Okay, go ahead.

20 MR. MOORE: I'm concerned they're going to use that,  
21 this deposition for discovery in their other case and I don't  
22 want that to happen.

23 THE COURT: I agree.

24 MR. MOORE: And they say here, limited scope of his  
25 expected testimony at trial. I would ask that the Court direct

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1 that the City limit it that way and limit the amount of time  
2 they can do this deposition.

3 MR. CHARNEY: And --

4 THE COURT: I agree with all of that.

5 MR. CHARNEY: And, your Honor, we can provide  
6 guidance --

7 THE COURT: It may be that he wants to come to New  
8 York if I tell him that it could be a supervised deposition and  
9 we'll have the Magistrate Judge supervise it to make sure it  
10 doesn't veer off course.

11 MR. MOORE: Thank you.

12 THE COURT: Who is the Magistrate Judge and who is the  
13 Judge in the case he has?

14 MR. CHARNEY: That I can find that out, I'm --

15 MS. PUBLICKER: Judge Sweet, your Honor.

16 THE COURT: Do we know the magistrate judge?

17 MS. PUBLICKER: There is no magistrate.

18 THE COURT: There isn't in the wheel. Actually, Judge  
19 Sweet may not have referred it, but a name, both names are  
20 always drawn when the case is filed. So I just need a docket  
21 number and I can find that out.

22 MS. PUBLICKER: It's 10 CV 6005.

23 THE COURT: I don't think anybody on my side wrote  
24 that down. 10--

25 MS. PUBLICKER: 10 CV 6005.

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1 THE COURT: We'll look it up and figure out the  
2 Magistrate Judge then it can be supervised. That may be  
3 attractive to Mr. Gilbert and him. So it does not veer off  
4 course, and relates only to his testimony in this case and is  
5 not used as an end round to get discovery ahead of time in this  
6 case.

7 MS. GROSSMAN: Your Honor, I just don't -- I mean the  
8 plaintiffs have called him, listed him as a witness on their  
9 case. I don't know that it's limited to or what, you know --

10 MR. CHARNEY: Can I respond to that?

11 THE COURT: Yes.

12 MR. CHARNEY: The response is we have, as I said, a  
13 very detailed affidavit. It was produced to them in 2011 in  
14 opposition to summary judgment. There is a very detailed list  
15 of the matters he will testify about. We ask that the  
16 deposition be limited to these matters.

17 MS. GROSSMAN: Your Honor, I just want to make sure  
18 the if he doesn't appear for deposition in Albany, that he's  
19 precluded from testifying at trial.

20 THE COURT: No, I didn't say that. I said he may  
21 choose to come to New York for a supervised deposition. I  
22 don't know anything about --

23 MS. GROSSMAN: Okay right.

24 THE COURT: What I'll probably do is contact Gilbert,  
25 see how wants to handle it. He has a choice of Albany, has a

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1 choice of New York. But if it's New York I can get him the  
2 Magistrate Judge to supervise. It should be a limited number  
3 of hours, should not stray off the topics that are in the  
4 affidavit declaration that he submitted, you know.

5 MS. GROSSMAN: Well --

6 THE COURT: That's the scope of his testimony.

7 MR. CHARNEY: Exactly, your Honor.

8 MS. GROSSMAN: Right, well, the propriety, you know,  
9 the -- whatever goes on with the audio tapes, the whole purpose  
10 of having the hearing --

11 THE COURT: That's why I was willing to have a  
12 hearing.

13 MS. GROSSMAN: Right. So it's the scope of what would  
14 be covered in why we're having a hearing is what we want to  
15 cover at the deposition. But all I want to say is whatever the  
16 decision is, whether he's ordered to come down to appear for  
17 deposition --

18 THE COURT: Not order. That would be his choice.

19 MS. GROSSMAN: Right. If he volunteers to come down  
20 here under supervision or we go to Albany, if he fails to  
21 appear in either situation, we want preclusion because he  
22 shouldn't then be able to come to testify at trial. So that's  
23 all that I would like.

24 MR. CHARNEY: Your Honor, just to be clear, are  
25 defendants going to have to go through the normal course in

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1 other words, subpoena him? Because, you know, again we don't  
2 have any control over this witness.

3 THE COURT: I got that.

4 MR. CHARNEY: It seems to me they should have to  
5 subpoena him, they should have to make the proper attempts to  
6 actually secure his deposition. I understand if he doesn't  
7 cooperate, but again I just want to make it clear that the  
8 plaintiffs are not expected to try to obtain --

9 THE COURT: Just provide the Court with the name of  
10 the attorney.

11 MR. CHARNEY: Of course.

12 THE COURT: And contact information. I'll take it  
13 from there.

14 MS. GROSSMAN: And we would just ask that he get a  
15 court order, rather than us having to go issue a subpoena, then  
16 move to compel him we know that we just need to be expedient  
17 here.

18 THE COURT: I got it. As soon as I get the contact  
19 information, I'll work on it.

20 MR. CHARNEY: I can give you that tomorrow, your  
21 Honor.

22 THE COURT: Thank you.

23 Where are we up to? Oh, yes. That's the last one on  
24 my list.

25 MS. GROSSMAN: We also have the Provost release.

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1 THE COURT: The last one, here you are.

2 In order to require plaintiffs to provide executed  
3 release of class member Ian's provost record. Plaintiff's  
4 promised it would be given weeks ago. What is the problem?  
5 Today is -- January 17th; today is the 31st, two weeks ago.

6 MS. BORCHETTA: Your Honor, I will respond.

7 We have -- I have a copy of the provost release right  
8 here that I can give to the City. The problem is that because  
9 of a miscommunication, he sent me the copy rather than the  
10 original. Again, he is in North Carolina, he has now sent me  
11 the original, I believe, so I have told him to send the  
12 original and he said he will. I have a copy to give to the  
13 City

14 THE COURT: Give them a copy and the original should  
15 be coming. All right.

16 MS. BORCHETTA: And there is one additional issue that  
17 was raised in the defendant's letter that we didn't respond to  
18 in writing and that is that the City --

19 THE COURT: Oh good. The Magistrate Judge in the  
20 other case is Judge Freeman. I will speak to her about  
21 supervising.

22 Go ahead. Is this a holiday? Is February 12th a  
23 holiday?

24 MR. CHARNEY: It is Lincoln's birthday.

25 MR. MOORE: He was the president, yes.

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1 THE COURT: A good president.

2 MS. BORCHETTA: The City, on Tuesday --

3 MR. MOORE: Also Mardi Gras, but.

4 MS. BORCHETTA: The City, on Tuesday, identified for  
5 the first time an Officer Lumia L-U-M-I-A, that is related to  
6 the Nicolas Pert stop --

7 THE COURT: Yes. I saw that.

8 MS. BORCHETTA: -- because they did not seek to  
9 preclude his testimony based on lack of knowledge along with  
10 the other Nicholas Pert officers.

11 THE COURT: Right.

12 MS. BORCHETTA: That leads us to believe that he does  
13 have personal knowledge.

14 THE COURT: Actually, I thought that was White and  
15 Lumia.

16 MS. BORCHETTA: White we have deposed, your Honor.

17 THE COURT: So you want to depose Lumia?

18 MS. BORCHETTA: We want to depose Lumia.

19 THE COURT: If he has knowledge, yes. All right, now  
20 we are done?

21 MS. GROSSMAN: No, your Honor. I have a few  
22 housekeeping matters.

23 First of all, we submitted, with the plaintiffs, a  
24 stipulation of withdrawal of the damages claims and there is a  
25 dispute over the language of the stipulation. All we want is

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1 an agreement in the stipulation that says that all the damages  
2 claims are dismissed with prejudice against all the defendants.  
3 Very simple.

4 THE COURT: That sounds right. Who objects to that,  
5 Mr. Hellerman?

6 MR. HELLERMAN: Your Honor, this is the first we hear  
7 there was a dispute. We sent them a draft on Monday, we  
8 haven't heard from them. We will be glad to meet and confer  
9 with the City.

10 THE COURT: We will get it done.

11 MS. GROSSMAN: But, if we can get --

12 THE COURT: The guidance is what you said sounds right  
13 but work it out with Mr. Hellerman.

14 MS. GROSSMAN: Hopefully we can get that language and  
15 subpoena and stipulation it will be good.

16 THE COURT: Hopefully.

17 MS. GROSSMAN: Also, we want to renew the motion on  
18 NYCLU's report. The last time we raised this issue you  
19 expected to have a declaration from the NYCLU and we haven't  
20 seen one.

21 THE COURT: What did I want them to write? I did want  
22 something.

23 MS. GROSSMAN: It was sent to the City of New York and  
24 you said Mr. Dunn or someone from the NYCLU --

25 THE COURT: That it was actually sent there, that the  
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1 City had notice of it.

2 MS. GROSSMAN: We asked for an affidavit and we didn't  
3 get one.

4 THE COURT: I agree.

5 MS. GROSSMAN: And it has been weeks.

6 THE COURT: I agree.

7 Where are we up to on that, Mr. Charney.

8 MR. CHARNEY: The NYCLU is here right now.

9 THE COURT: Was this report sent? I need a  
10 declaration. The report was sent to the City, it is a matter  
11 of notice. It is a notice issue. Does anybody know if it was  
12 sent to them?

13 MR. CHARNEY: The mission failure report?

14 MR. DUNN: I believe that we do know. I was not the  
15 person personally responsible for that.

16 THE COURT: Can you track down that person and get a  
17 declaration.

18 MR. DUNN: By when?

19 THE COURT: ASAP, thank you. I suspect they can do  
20 it, they just have to get it done. They're busy too.

21 MS. GROSSMAN: Okay. Then another issue on  
22 Mr. Silverman, the questionnaires. As you may recall, the  
23 survey questions --

24 THE COURT: That's the guy who doesn't work for  
25 anybody and is doing his own research?

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1 MS. GROSSMAN: Yes.

2 THE COURT: Okay.

3 MS. GROSSMAN: I understand that the Court ruled that  
4 we are supposed to get the questionnaires and with certain  
5 questions you ordered to be produced in along with some  
6 narrative fields that should be redacted.

7 THE COURT: Everything is on the record. I must have  
8 said it.

9 MS. GROSSMAN: Yes. We have not received that yet and  
10 we understand that we want the actual hard copies of those  
11 questionnaires with the narratives married up to whatever the  
12 questions were asked so that we can look at it and do our own  
13 analysis.

14 THE COURT: If there is an expense in the photocopying  
15 the City will pay for it.

16 MS. GROSSMAN: I'm sorry?

17 THE COURT: If there is an expense in the photocopying  
18 the City will pay for it. Silverman is not under the  
19 plaintiff's control. It is a small point, I'm sorry.

20 MS. GROSSMAN: It is a small point. We produced  
21 hundreds of thousands --

22 THE COURT: He is not a party. He is not controlled  
23 by a party. If that is an issue you will pay for the paper.

24 MR. CHARNEY: Your Honor, can I respond?

25 THE COURT: If you want hard copy you will pay.

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1 MS. GROSSMAN: Yes, we will pay for a hard copy.

2 MR. CHARNEY: First of all, here is the issue: It is  
3 not true that we haven't given them the data. We have given  
4 them the data to the responses -- the non-narrative responses  
5 that you ordered.

6 THE COURT: Okay.

7 MR. CHARNEY: The narratives we are prepared to  
8 produce, we have them redacted.

9 THE COURT: Good.

10 MR. CHARNEY: The problem is the City has not agreed  
11 to the protective order that you also ordered had to be  
12 finalized before we produced anything. So, that is the issue.

13 THE COURT: Ms. Grossman?

14 MS. GROSSMAN: For attorneys' eyes only --

15 THE COURT: The court reporters are trained only to  
16 take the Judge, Mr. Charney, if one voice is talking over the  
17 over. I always win. So, just a moment, please?

18 MR. CHARNEY: Okay.

19 THE COURT: So, Ms. Grossman, if that's the delay,  
20 please try to finalize the required protective order so you can  
21 get the data you want?

22 MS. GROSSMAN: That's not the delay, though, because  
23 we agreed that we will look at it attorneys' eyes only. We  
24 asked for it to have the law department to have it attorneys'  
25 eyes only so we can negotiate the exact terms of the mechanics.

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1 THE COURT: And if they agreed to it it is like the  
2 arguments you make. I can't compel them. Agreements are  
3 voluntary.

4 MS. GROSSMAN: They did.

5 THE COURT: If they agreed to --

6 MS. GROSSMAN: Yes, agreed.

7 THE COURT: -- turn it over, Mr. Charney --

8 MS. GROSSMAN: So, let me be clear. They provided  
9 some statistical summaries statistics but what we want is the  
10 hard copies.

11 THE COURT: I heard that you want the hard copies.

12 MS. GROSSMAN: We don't want the narratives separated  
13 from the questionnaire.

14 THE COURT: I agree. It has to be photocopied and the  
15 City will pay for it. It is not Silverman's problem.

16 MR. CHARNEY: Your Honor, we can give all the raw data  
17 first. They have the responses, they don't have the summaries.

18 THE COURT: Is it --

19 MR. CHARNEY: Your Honor, we are talking about 25,000  
20 pages.

21 THE COURT: That's why I'm saying they can pay for it.

22 MR. CHARNEY: We have to redact it first.

23 The reason we gave it to them in electronic form is it  
24 was a lot easier to redact. We can take out the portions of  
25 the answers, give them the answers they were entitled to.

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1 THE COURT: Mr. Charney, I made a decision.

2 MR. CHARNEY: When do we give them the hard copies  
3 that needed to be redacted? We were under no notice we had to  
4 give them hard copy responses.

5 THE COURT: You tell me how long it will take to do  
6 these redactions.

7 MR. CHARNEY: This is 25,000 pages.

8 THE COURT: Not all pages need redactions.

9 MR. CHARNEY: Your Honor, because the vast majority of  
10 responses, as we talked about with you a couple weeks ago, were  
11 not relevant, we are only talking about four answers out of 24  
12 on a survey.

13 THE COURT: So it is not 25,000 pages that need  
14 redacting.

15 MR. CHARNEY: Four fifths of that is 20,000 pages.

16 THE COURT: Those don't need redacting, it is the  
17 opposite. You mean taking out? You just don't photocopy those  
18 pages. You don't redact them, you don't photocopy them.

19 MR. CHARNEY: The problem is the answers that are  
20 relevant are on the same pages as answers that are not  
21 relevant.

22 The other reason, your Honor, the reason you ordered  
23 us to turn this data over is so they could reasonably indicate  
24 the analysis. We gave it to them in electronic format. In  
25 terms of the matching --

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1 THE COURT: I have no idea why Ms. Grossman wants this  
2 in hard copy. I have no idea. I have no idea.

3 MR. CHARNEY: In terms of the burden --

4 THE COURT: There must be a reason. It can't just be  
5 to go over the edge of despair. It can't be the only reason.  
6 There must be a real reason.

7 Why do you want this all in paper if you have it  
8 already electronically?

9 MS. GROSSMAN: I don't have it all electronically and  
10 I don't know what is in the writing like who is going to be  
11 typing -- is it typed? I want the hard copies so that I can  
12 know --

13 THE COURT: Take a sample and see if it does a lot for  
14 you. Why don't you produce a hundred of these? How many are  
15 there?

16 MR. CHARNEY: There is 2,500.

17 THE COURT: 2,500.

18 MR. CHARNEY: A hundred survey responses.

19 THE COURT: Wait. I lost you now.

20 There are 2,500 survey responses.

21 MR. CHARNEY: Yes.

22 THE COURT: And then there is a hundred what? 2,500  
23 responses? You said the word a hundred.

24 MR. CHARNEY: I didn't mean that.

25 THE COURT: Of the 2,500 respondents pick the first

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1 100, produce them in hard copy, the redactions, one week. And  
2 then, after you see the hundred, tell us if this exercise is  
3 worth it and you need all 2,400 more now that you see what it  
4 looks like. Maybe if you have seen a hundred you have seen  
5 them all.

6 MS. GROSSMAN: The reason why I want it --

7 THE COURT: I understand, but look at the first  
8 hundred you get and you will know whether you need the rest.

9 MS. GROSSMAN: But I know that, why I will need it  
10 now, and if I wait for next week or two weeks now or two weeks  
11 I will be delayed in analyzing it. I need to see of the  
12 officers who actually checked off whatever pressure or lack of  
13 pressure they felt when they were issuing a summons or 250 or  
14 arrest. I also want to know from that particular officer who  
15 responded because we also know when they retired and what kind  
16 of experience they had with the police department. I also want  
17 to know --

18 THE COURT: When they retired.

19 MS. GROSSMAN: Hired; because if they were not  
20 present, if they retired back before 2002 -- before 1994, that  
21 is something that we can impeach.

22 MR. CHARNEY: They have it.

23 MS. GROSSMAN: Just listen --

24 THE COURT: I am listening. That was rude.  
25 Can you get that off the electronic version?

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1 MS. GROSSMAN: No. The electronic version does not  
2 have the narrative in it.

3 MR. CHARNEY: That's the point, we are going to give  
4 it to them tomorrow, all the narratives.

5 THE COURT: Will they know which it goes with?

6 MR. CHARNEY: Yes, because every single narrative  
7 answer has a case number which corresponds to the responses of  
8 the electronic data so they will be able to match up every  
9 single response with every narrative. They don't need the hard  
10 copies.

11 THE COURT: This is beginning to sound silly. When  
12 you get them tomorrow is that hard copy?

13 MR. CHARNEY: Yes. It is PDFs, the narratives, and  
14 every single one has a number that matches to the answers for  
15 the other non-narrative.

16 MS. GROSSMAN: Then I do want a sampling of the 100.

17 THE COURT: Okay.

18 MS. GROSSMAN: Because I want to test that whatever I  
19 did get is accurate.

20 THE COURT: That we will do. Tomorrow you will give  
21 her the PDFs of all 2,500 narratives. A week from now you give  
22 her 100 of these in hard copy and I see if there is any  
23 other --

24 MR. CHARNEY: By hundred you mean hard copy  
25 narratives?

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1 THE COURT: You are giving all hard copy narratives  
2 tomorrow, 100 complete questionnaires redacted.

3 MR. CHARNEY: What is the purpose of that?

4 THE COURT: That is not an appropriate question,  
5 Mr. Charney. If the Court orders something at some point you  
6 do it.

7 MR. CHARNEY: I understand. I didn't understand --

8 THE COURT: You give her 100.

9 MR. CHARNEY: Got it.

10 THE COURT: Because she says she needs them to test  
11 what you gave her electronically in PDF and see if she can work  
12 with it. Give her the full hundred out of 2,500.

13 MS. GROSSMAN: We want them to have the narratives in  
14 it.

15 THE COURT: Of course.

16 MR. CHARNEY: We still don't have the confidentiality  
17 order agreed to.

18 THE COURT: But she says you agreed to produce that in  
19 advance of that for attorneys' eyes only so the confidentiality  
20 order could then be fully negotiated.

21 MR. CHARNEY: I guess that to be clear that means  
22 nobody outside of the Law Department is allowed to see any of  
23 this information until we have a confidentiality order in  
24 place.

25 THE COURT: I think that's correct; right,  
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1 Ms. Grossman? You said attorneys' eyes only in the Law  
2 Department.

3 MS. GROSSMAN: Right. What we worked --

4 THE COURT: You cannot share it with your expert until  
5 you sign the confidentiality order.

6 MS. GROSSMAN: Right.

7 THE COURT: She says right.

8 MS. GROSSMAN: My understanding is, in principle, the  
9 plaintiffs are on board.

10 MR. CHARNEY: No, we --

11 THE COURT: Only after there is an executed copy.

12 MS. GROSSMAN: Yes. Whatever the terms of a  
13 confidentiality order we expect it will include that we can  
14 share it with an expert.

15 THE COURT: That's why confidentiality orders are  
16 entered but, until then, attorneys' eyes only.

17 MS. GROSSMAN: We would also expect that we can share  
18 it with certain people in the police department who can help us  
19 analyze.

20 THE COURT: One would think, but only after the  
21 signing of a confidentiality order.

22 MS. GROSSMAN: Yes.

23 THE COURT: Until that time, Law Department only.

24 MS. GROSSMAN: Right.

25 THE COURT: Right. All right.

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1 MR. CHARNEY: In terms of the hundred hard copies  
2 which will have to be redacted, when do we have to provide  
3 those by?

4 MR. MOORE: One week.

5 MR. CHARNEY: One week, February 7. Got it, your  
6 Honor.

7 MS. GROSSMAN: Your Honor, my last item is I raised  
8 this when, back in January, it's notice from the plaintiffs of  
9 the sequence of their witnesses given that we have a four to  
10 six week trial, we really do need to know the first 20  
11 witnesses that the plaintiffs are expecting to call so that we  
12 can get -- we can schedule our witnesses, make sure they're  
13 available.

14 THE COURT: I got it. When do you think you should  
15 get that? Or did I already set a date?

16 MS. GROSSMAN: You didn't set a date.

17 THE COURT: I agreed with you that they should tell  
18 you an order. I mentioned in criminal cases even the  
19 government does it a week or so in advance but when do you?

20 MS. GROSSMAN: Given -- for example, if the plaintiffs  
21 are expecting to call the first 20 witnesses and high-level  
22 police officials are going to be included, I need to know that  
23 now.

24 THE COURT: You don't need to know it now. Now is six  
25 or seven weeks before trial. There has to be a date that is

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1 realistic. It is not now. That's not realistic.

2 MS. GROSSMAN: I think in the next two weeks it would  
3 be fair so that I can figure out --

4 THE COURT: I don't see why. Can I talk to you about  
5 something else? Because this will help me with this long  
6 floating date. What do we really realistically think is the  
7 length of this trial including now this combined remedies  
8 hearing? What do we really think is the total length of this  
9 trial?

10 MS. GROSSMAN: Your Honor, I don't know that it  
11 changes much but I can say that there are a whole host of the  
12 witnesses that plaintiffs have listed who have been retired  
13 that haven't been in the police department for a while, and I  
14 can't tell if the plaintiffs are really pressing to have those  
15 witnesses attend and give testimony or if they're willing to  
16 forego that. And it would be helpful to know.

17 THE COURT: Well, you will know on February 19th.

18 MS. GROSSMAN: Well, you asked the question. I'm  
19 trying to respond and help.

20 THE COURT: I did. I appreciate that.

21 MS. GROSSMAN: So, if you wait to wait until February  
22 19th. There is 112 witnesses now --

23 THE COURT: Jointly.

24 MS. GROSSMAN: -- jointly.

25 THE COURT: Jointly.

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1 MS. GROSSMAN: We may be cutting some of them given  
2 what your rulings were today, but.

3 THE COURT: Anybody want to take a stab at what they  
4 really think the length of this trial is? I'm serious. I'm  
5 trying very hard to see if I can fit in a criminal trial before  
6 yours. That's the only reason I am thinking about the 18th.

7 MR. MOORE: I'm thinking we have said, Judge --

8 THE COURT: I think we sort of said four to six weeks  
9 but that is a bit floating, and if it is worse than that I have  
10 to know.

11 MR. MOORE: One of the things -- I can't say. I mean,  
12 every time I have predicted the length of a trial I have been  
13 wrong. I think we can move it quickly. I think one of the  
14 things we are trying to do is expedite it by providing excerpts  
15 of depositions rather than having to call the person to the  
16 stand.

17 THE COURT: I understand.

18 MR. MOORE: We are trying the best we can to try to  
19 reduce the number of witnesses. I guess we really couldn't say  
20 at this point. We may be in a position to tell you in a week  
21 or two how long we think our part of the proof will be but I  
22 don't think we can really say that at this point.

23 THE COURT: Okay.

24 MR. MOORE: I wish I could say more.

25 THE COURT: Okay.

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1 MR. MOORE: Which is one of the reasons I thought the  
2 collaborative process was a good idea to try to resolve this  
3 case.

4 THE COURT: I understand it. I would have gone along  
5 if the City would have gone along. I would have given up my  
6 remedies phase hearing, just had a liability trial, I would  
7 have paused for the 90 days despite my indication to have done  
8 it. But, it sounded beneficial and interesting to all  
9 participants but I won't compel it; certainly not when there is  
10 not even a liability finding.

11 MR. MOORE: We will see what happens. If we get to  
12 that point we will see what happens.

13 THE COURT: Correct.

14 MR. MOORE: But I think I have to say that -- we are  
15 much more willing to try to enter into that process now if  
16 there is a liability ruling.

17 THE COURT: I understand. It just would have made the  
18 planning for this trial much easier had the City thought that  
19 that was a wise idea. All they were being asked to do in that  
20 so-called collaborative process was discuss things. Nobody was  
21 saying they had to agree to anything. It was going to be a  
22 mediated discussion. I wonder why they were so opposed to  
23 mediated discussion.

24 MR. MOORE: To discuss it in the context of an issue  
25 that clearly is important to a lot of people in the City. It

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1 is not like this is some obscure case involving some incident.  
2 This is about something that's very important.

3 THE COURT: I understand that. I might have thought  
4 the City would have said: Good idea and less work for us. We  
5 would try the liability phase and have a 90-day time out to sit  
6 with a neutral and discuss ideas. We don't have to agree to  
7 anything. It is a big discussion around the table with lots of  
8 players and a good mediated discussion.

9 MR. MOORE: I appreciate the thought. It was a good  
10 idea.

11 THE COURT: I thought they would say it was a great  
12 idea and less worry for them now than to get ready for the  
13 so-called remedies hearings.

14 MS. GROSSMAN: Your Honor, don't forget, we engaged in  
15 settlement discussion with a magistrate a long time ago and the  
16 parties were so far apart then it does not appear --

17 THE COURT: I think it is a very different case now  
18 and things have changed over the years, I must say. I think it  
19 is a very different case today than it was whenever you last  
20 discussed it. And different players would be -- I wouldn't  
21 even call it a settlement discussion in a way, it is a mediated  
22 discussion of the issues and the possible ways to remedy what  
23 some people see as problems and others don't and what is to be  
24 done. I am probably preaching to the wrong person -- you're  
25 the lawyer not the client -- but I'm sure your client has

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1 guided but it is kind of a shame the police department doesn't  
2 want to sit down with all these different constituencies in a  
3 mediated discussion to discuss this issue.

4 MS. GROSSMAN: Understand the City Council and there  
5 is other processes that has been going on and so, you know,  
6 we --

7 THE COURT: Nobody would compel you to agree to  
8 anything. It would be, as I said before, a mediated discussion  
9 of all the issues; the pros, the cons. I have certainly read a  
10 lot of commentary from all kinds of sources in the community,  
11 I'm sure you follow the online nonsense but -- one reads it, it  
12 is out there -- there are many different viewpoints. Even in  
13 the community, there are some who like this practice, some who  
14 don't.

15 MS. GROSSMAN: I think that's where litigation is not  
16 the place to engage in that process.

17 THE COURT: That is what Mr. Moore is saying. That's  
18 what his suggestion is saying, is take it out of the  
19 courtroom --

20 MR. MOORE: Thank you.

21 THE COURT: -- and into a conference room with all  
22 different kinds of players, have a mediated discussion and talk  
23 things through. You might get somewhere that you will never  
24 get to in a litigation context. He agrees with you. You just  
25 don't hear the agreement.

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1 MS. GROSSMAN: Oh, I understand, and I understand that  
2 at the end of the day there is a consent decree in Cincinnati  
3 and so that's litigation and that's a consent order and so that  
4 isn't just having a nice conversation with people in the  
5 community.

6 THE COURT: No, but apparently as a result of the  
7 conversations all sides wanted to enter into that consent  
8 order. That's what resulted in a consent order.

9 All right. I can only ask you to read this portion of  
10 the transcript again and maybe show it to your clients.

11 In any event, where are we up to? I lost track.

12 MS. BORCHETTA: Your Honor, we were discussing the  
13 possible date.

14 THE COURT: Oh, the day. So, I'm leaning toward the  
15 18th because I know you all want the time and it might allow me  
16 to squeeze in this criminal trial before. It will be madness  
17 but we will see, but I'm leaning there but still not willing to  
18 commit to it until I hear more, which I guess I will hear no  
19 later than February 19th. If you all really want that date  
20 work hard to cut back your 112.

21 MR. MOORE: All right, Judge.

22 THE COURT: And then I will probably do it.

23 MS. GROSSMAN: And, your Honor, you mentioned you have  
24 another trial starting May 5th?

25 THE COURT: I do. That's the problem. That's seven

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1 weeks later.

2 MS. GROSSMAN: Okay, just in terms of how we plan.

3 THE COURT: Well, you know, look. Nobody gets a  
4 contract. If they slip to the 12th they slip to the 12th, but  
5 that's the date on that one. It is a very big case also.

6 MR. MOORE: Is it about thermometers?

7 THE COURT: It is about rating agencies. You know you  
8 have heard of the rating agencies S & P, Moodies.

9 MR. MOORE: Yes. I know.

10 THE COURT: Very big case. All right. All right, I  
11 think you get to go for now.

12 One more thing. We probably should calendar another  
13 meeting for sure, the question is when. Would it be after  
14 February 19th or you see the plaintiff's joint pretrial order?  
15 Should we keep the hearing on the 12th that we already have  
16 scheduled?

17 MS. GROSSMAN: The 12th we would look to do the  
18 depositions so perhaps we could -- at least the 12th wouldn't  
19 be -- we could work around that but the 12th we are looking to  
20 do the deposition.

21 THE COURT: I know you are looking to.

22 MR. MOORE: I think it makes sense to do it after the  
23 pretrial order.

24 THE COURT: After the 19th. Or both sides after the  
25 26th.

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1 MS. GROSSMAN: 27th.

2 THE COURT: Obviously if you think you need my time  
3 before then you will ask for it, but in terms of picking a date  
4 let's look at the 28th of February. But, I wouldn't be shocked  
5 if one side or the other said we need you.

6 MR. MOORE: What about the 28th?

7 THE COURT: I'm looking at it. I'm out of town the  
8 28th and the 1st of March.

9 MS. GROSSMAN: Is March 5th an option?

10 THE COURT: It will have to be March 5th at 4:30.  
11 Okay. March 5th at 4:30.

12 All right, are we done? I think we're done, yes?

13 MR. MOORE: Thank you, Judge, for your patience.

14 MS. GROSSMAN: Thank you, your Honor.

15 MS. BORCHETTA: Thank you, your Honor.

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